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IN THE

Supreme Court of the United States

October Term, 1949.
No. 562

LOCAL 36, INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES MCLAUCHLAN, ROBERT M. PHELPS, BURT D. LACKYARD, and RAY J. MORKOWSKI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

PAGE

Statement of matter involved 2

The indictment and pre-trial proceedings 2

The trial 5

A. The economic status of the petitioners 5

1. The individual fishermen 5

2. The Local 8

B. The economic status of the dealer 9

C. Distribution, price and size of catch 10

D. History of collective bargaining in the west coast fishing industry 12

E. The 1946 San Pedro strike and the proposed contract 15

F. Strike activities and their effect upon commerce 17

G. Instructions and other trial proceedings 20

Evidence in support of challenge to jury panels 24

Statement as to jurisdiction 32

Statutes involved 32

Questions presented 35

Reasons for granting the writ 36

I.

Under the Sherman Act, as modified by Section 6 of the Clayton Act, and the Fishermen's Marketing Act, the Local, as an organization of working fishermen, has the right to seek and to enter into contracts establishing the price at which the fish caught by its members is sold by said individual members directly to the individual dealers 41

PAGE

A. The law construed in the light of the provisions and legislative history of the Sherman Act, Section 6 of the Clayton Act, the Norris-La Guardia Act, the Capper-Volstead Act and the Fishermen's Marketing Act substantiates petitioners' contention that the proposed contracts do not infringe upon the Sherman Act..... 41

B. Moreover, the Fishermen's Marketing Act standing alone supports the validity of the proposed contracts..... 58

II.

Evidence of economic conditions of working fishermen, of the effect of collective bargaining agreements on production and on consumer prices and similar economic facts were relevant on the issue of the validity of the proposed contracts, and such evidence should have been admitted and considered by the jury under appropriate instructions..... 64

III.

If, as petitioners contend, since the proposed contract did not violate the Sherman Act, the "strike" and the activities pursuant thereto designed to secure said contract were not restraints of trade within the purview of the Sherman Act..... 70

IV.

The selection of a substantial percentage of those listed for possible jury service from society registers and clubs and of most of the balance from the telephone directory, together with the use of lists of names thus selected accumulated over a period of over twenty years in a community in which the economic composition of the population has radically changed does not comport with the concept that a jury should be a representative body drawn from a cross-section of the community, particularly where the method of selection results in a consistent and extreme overrepresentation of persons in the higher, and underrepresentation of those in the lower, economic classifications 77

Conclusion 85

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alaska Salmon Industries, Inc., Matter of, 27 War Lab. Rep. 760	69
Allen Bradley Co. v. Local Union No. 3, 325 U. S. 797	45, 53, 55, 63, 65, 71, 72
Anaheim Citrus Fruit Assn. v. Yeoman, 51 Cal. App. 759, 197 Pac. 959	46
Anderson v. Shipowners Assn., 272 U. S. 359	63
Anderson v. United States, 171 U. S. 604	50
Apex Hosiery Co. v. Leader, 310 U. S. 469	44, 50, 63, 66, 71, 73, 74, 75, 76
Appalachian Coals Inc. v. United States, 288 U. S. 344	59, 66, 67, 68, 75
Arkansas Cotton Growers Co-op. Assn. v. Brown, 168 Ark. 504, 270 S. W. 946	46
Associated Press v. United States, 326 U. S. 1	63
Baldwin County Producers Corp., Ex parte, 203 Ala. 345, 83 So. 69	46
Ballard v. United States, 329 U. S. 187	78, 83, 84
Bedford Cut Stone Co. v. Journeymen Stone Cutters, 274 U. S. 37	72
Board of Trade v. United States, 246 U. S. 231	65, 67
Brock v. Hardie, Sheriff, et al., 114 Fla. 670, 150 So. 690	46
California Raisin Growers v. Abbott, 160 Cal. 601, 117 Pac. 767	46
Columbia River Packers Association v. Hinton, 315 U. S. 143	14, 53, 54, 55, 61, 71, 72
Castorland Milk Co. v. Shantz, 179 N. Y. S. 131	46
Connolly v. Union Sewer Pipe Co., 184 U. S. 540	48, 52
Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295	75
Dark Tobacco Growers v. Dunn, 150 Tenn. 614, 266 S. W. 308	44, 46

PAGE

Dark Tobacco Growers v. Mason, 150 Tenn. 228, 263 S. E. 60 46

Dark Tobacco Growers v. Robertson, 84 Ind. App. 51, 150 N. E. 106 46

Dr. Miles Co. v. John D. Park & Sons Co., 220 U. S. 373..... 65

Duplex Printing Press Co. v. Deering, 254 U. S. 443.....62, 63

Eastern States Retail Lumber Dealers Assn. v. United States, 234 U. S. 600..... 63

Ethyl Gasoline Corp. v. United States, 309 U. S. 436.....63, 64

Glasser v. United States, 315 U. S. 60.....78, 80, 81, 83, 84

Hawaiian Tuna Packers, Ltd. v. ILWU, 72 Fed. Supp. 562..... 55

Hopkins v. United States, 171 U. S. 578..... 50

Indiana Farmer's Guide Pub. Co. v. Prairie, 293 U. S. 268..... 63

Johnson v. Georgia-Carolina Retail Milk Producers Assn., 182 Ga. 659, 186 S. E. 824.....59, 60

Kansas Wheat Growers v. Charlet, 118 Kans. 765, 236 Pac. 657 46

Kansas Wheat Growers v. Oden, 124 Kan. 179, 257 Pac. 975.... 46

Kansas Wheat Growers v. Rowan, 123 Kan. 169, 254 Pac. 326.. 46

Kansas Wheat Growers v. Schulte, 113 Kan. 672, 216 Pac. 311 46

L. & N. Railroad Co. v. Burley Tobacco Soc., 147 Ky. 22, 143 S. W. 1040..... 46

Lennox v. Texas Cotton, 257 S. W. 935, 55 S. W. 2d 543..... 46

Levering & G. Co. v. Morrin, 289 U. S. 103..... 50

Liberty Warehouse Co. v. Burley Tobacco Growers Coop. Assn., 208 Ky. 643, 271 S. W. 695.....46, 52

List v. Burley Tobacco Growers Co-op. Assn., 114 Ohio State 361, 151 N. E. 471..... 46

Louisiana Farm Bureau v. Bacon, 164 La. 126, 113 So. 790..... 46

Louisiana Farm Bureau v. Clark, 107 So. 115..... 46

Loewe v. Lawlor, 208 U. S. 274.....45, 63, 72

Manaka v. Monterey Sardine Industries, 41 Fed. Supp. 531..... 55

Manchester Dairy System v. Hayward, 82 N. H. 193, 132 Atl. 12 46

PAGE

Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219 63

Mid-West Theatres Co. v. Cooperative Theatres of Michigan, Inc., 43 Fed. Supp. 216 62

Minnesota Wheat Growers v. Huggins, 162 Minn. 8, 203 N. W. 420 ..... 44, 46

Montague & Co. v. Lowry, 193 U. S. 38 63

National Labor Relations Board v. Blount, 131 F. 2d 585; cert. den., 318 U. S. 791 68

National Labor Relations Board v. E. C. Atkins & Co., 331 U. S. 398 68

National Labor Relations Board v. Hearst, 322 U. S. 111 68

North Wisconsin Co-Op. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N. W. 936 46

People v. Gasman, 295 N. Y. 254, 66 N. E. 2d 705 69

Potter v. Dark Tobacco Growers Co-Op. Assn., 201 Ky. 441, 257 S. W. 33 46

Rutherford Food Corp. v. McComb, 331 U. S. 722 68

Singer v. Kirsch Beverages, 271 App. Div. 801, 65 N. Y. S. 2d 400 69

Smith v. Texas, 311 U. S. 122 ..... 29, 78, 83

South Carolina Cotton Growers v. English, 135 S. C. 19, 133 S. E. 542 46

Standard Oil v. United States, 283 U. S. 163 ..... 66, 67

Stark County Milk Producers Assn. v. Tabeling, 129 Ohio State 159, 194 N. E. 16 ..... 59, 60

Steers v. United States, 192 Fed. 1 63

Swift & Co. v. United States, 196 U. S. 375 62

Thiel v. Southern Pacific Co., 328 U. S. 217 ..... 78, 80, 83, 84

Tigner v. Texas, 310 U. S. 141 ..... 52, 65, 66

Tobacco Growers Co-Op. Assn. v. Jones, 185 N. C. 265, 117 S. E. 174 46

PAGE

Trenton Potteries case, 288 U. S. 375.....63, 64, 67

United Leather Workers v. Herkert & M. Trunk Co., 265 U. S. 457 75

United Brotherhood v. United States, 330 U. S. 395..... 63

United States v. American Livestock Comm. Co., 279 U. S. 435 46

United States v. Bay Area Painters & Decorators Joint Committee, 49 Fed. Supp. 733..... 50

United States v. Borden, 308 U. S. 188.....49, 50, 61, 62, 76

United States v. Brims, 272 U. S. 549..... 63

United States v. Columbia River Fishermen's Protective Assn., No. C-16087, D. C. Ore., June 15, 1943 (Unrep.).....55, 61, 70

United States v. Dairy Co-op. Assn., 49 Fed. Supp. 475.....46, 50

United States v. Debs, 64 Fed. 724..... 72

United States v. Frankfort Distilleries, Inc., 324 U. S. 293..... 62

United States v. Hutcheson, 312 U. S. 219.....51, 53, 62, 63, 71

United States v. King, 250 Fed. 908..... 62

United States v. Laflin, 24 F. 2d 683..... 69

United States v. Masonite Corporation, 316 U. S. 265.....63, 64

United States v. Peterson, 28 F. 2d 29..... 69

United States v. Rock Royal Cooperative, 307 U. S. 533, 26 Fed. Supp. 534.....60, 68

United States v. Socony-Vacuum Oil Co., 310 U. S. 150..... .....64, 65, 67

United States v. St. Joseph Stock Yards Co., 44 Fed. Supp. 31 62

United States v. Standard Oil Co., 170 Fed. 988..... 78

United States v. Universal Milk Bottle Service, 85 Fed. Supp. 622 62

United States v. Women's Sportswear Mfgrs. Assn., 336 U. S. 460 63

PAGE

United States v. Workingmen's Amalgamated Council, 54 Fed. 994 72

United States v. Yellow Cab Co., 332 U. S. 218 63

Warren v. Alabama Farm Bureau Cotton Assn., 213 Ala. 61, 104 So. 264 46

MISCELLANEOUS

36 Congressional Record (Jan. 6, 1903), p. 522 44

51 Congressional Record, pp. 9546, 13979-83 49

62 Congressional Record, p. 2156 58

62 Congressional Record, p. 2217 59

62 Congressional Record, pp. 2219-20 (1922) 56

62 Congressional Record, p. 2264 60

Fetter, Masquerade of Monopoly (Harcourt Brace & Co., 1931), pp. 247-50 ..... 44, 45

Fisheries Circular 22, Bureau of Fisheries, United States Department of Commerce (1936), pp. 2-3, 7, Organizing and Incorporating Fishing Cooperative Marketing Association 60, 61

Fishery Leaflet 277, Fish and Wildlife Service, United States Department of Interior (1948), pp. 5-6, 13, 15, Organizing and Incorporating Fishing Cooperative Marketing Associations 60, 61

Harper's (1930), Chap. 2, p. 21, Berman, Labor and the Sherman Act 43, 45

House Report No. 1504 (1934) 56, 59

Senate Report No. 698, 63rd Cong., 2d Sess. (1914), p. 46 49

T. N. E. C. Reports, p. 453, Feb. 25, 1941 59

STATUTES

Act of June 25, 1948, Chap. 646 (62 Stat. 869) 32

Anti-Trust Law (48 Stat. 1213, 15 U. S. C. A., Secs. 521, 522) 4

California Fish and Game Code, Sec. 486 11

California Fish and Game Code, Sec. 842 11

PAGE

California Fish and Game Code, Sec. 487 11
California Fish and Game Code, Sec. 717 11
California Fish and Game Code, Sec. 717.5 11
California Fish and Game Code, Sec. 730 11
California Fish and Game Code, Sec. 731 11
California Fish and Game Code, Sec. 734 11
California Fish and Game Code, Sec. 736 11
California Fish and Game Code, Sec. 842.5 11
California Fish and Game Code, Sec. 845 11
California Fish and Game Code, Sec. 846 11
California Fish and Game Code, Sec. 867 11
California Fish and Game Code, Sec. 868 11
California Fish and Game Code, Secs. 875-88 11
California Fish and Game Code, Secs. 900-7 11
California Fish and Game Code, Secs. 919-29 11
California Fish and Game Code, Secs. 940-59 11
California Fish and Game Code, Sec. 1061 11
California Fish and Game Code, Sec. 1063 11
California Fish and Game Code, Sec. 1064 11
California Fish and Game Code, Sec. 1065 11
California Fish and Game Code, Sec. 1068 11
Capper-Volstead Act (42 Stat. 388, Chap. 57, pars, 1, 2, 7 U. S. C. A., Secs. 291-292) 43, 51
Clayton Act, Sec. 6 (38 Stat. 731, 15 U. S. C. A., Sec. 17) 4, 33, 35, 41, 42, 48, 49, 54, 55
Fishermen's Marketing Act (48 Stat. 1213-14, 15 U. S. C. A., Secs. 521-2) 33, 42, 56
Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. A., Secs. 105-115) 42, 53
Sherman Act, Sec. 1 (Act of July 2, 1890, Chap. 647, 26 Stat. 209, 15 U. S. C. A., Sec. 1) 2, 32, 35, 62

TEXTBOOKS PAGE

39 Columbia Law Review, pp. 1283, 1307, Boudin, The Sherman Act and Labor Disputes....44, 45

40 Columbia Law Review, pp. 14, 26-7, Boudin, The Sherman Act and Labor Disputes....44, 45

Evans, Frank and Stodyk, The Law of Cooperative Marketing, Lawyers Coop. Pub. Co., N. Y., 1937, p. 163....60, 61

Hulbert, Legal Phases of Cooperative Associations, Farm Credit Administration, U. S. Dept. of Agriculture, Washington, D. C., 1942, p. 119.... 60

Judiciary and Judicial Procedure, Sec. 1254, Subsec. 1 (new Title 28, U. S. C.).... 32

29 Virginia Law Review, p. 395, Boudin.... 49

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Local 36 of the International Fishermen and Allied Workers of America, Jeff Kibre, Gilbert Zafran, Clifford C. Kennison, F. R. Smith, George Knowlton, Otis W. Sawyer, W. B. McComas, Harry A. McKittrick, Arthur D. Hill, C. Lloyd Munson, Charles McLauchlan, Robert M. Phelps, Burt D. Lackyard, and Ray J. Morkowski, pray that a Writ of Certiorari issue

to review a judgment of the United States Court of Appeals for the Ninth Circuit, rendered on September 28, 1949. A petition for rehearing was filed on behalf of all petitioners on October 26, 1949. It was denied on November 29, 1949. On motion of petitioners, they were granted an extension of thirty days to January 27, 1950, in which to file this petition in this Court. The mandate has been stayed by the court below.

The petitioners were indicted on August 23, 1946, under Section 1 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. Sec. 1, as amended) [R. 2-20]; they were all found guilty by a jury verdict on May 7, 1947 [R. 67-68]; thereafter, on May 21, 1947, judgment was entered as to each petitioner and fines totaling $12,900.00 were imposed [R. 73-98].

The Court of Appeals affirmed the trial court judgments, and this petition is directed to said judgment of affirmance. The decision below is reported at 177 F. 2d (Adv. Op.) 320.

Statement of Matter Involved.

The Indictment and Pre-trial Proceedings.

The indictment charges that Local 36 of the International Fishermen and Allied Workers of America, hereinafter referred to as the "Local", is an organization of fishermen; that some of the individual petitioners are officers of the Local and others are officers and fishermen; that the fishermen belonging to the Local are not employees and receive no salary; that the individual fisherman member of the Local is an independent business man who, either alone or as one of a group owns, leases, or operates a boat in foreign and territorial waters off

Southern California and Mexico, for the purpose of engaging on his own account in the business of catching fresh market fish for sale to dealers[1]; that the dealers in turn sell the fish to wholesalers or retailers; that approximately 75% of the market fishermen,[2] in the said fishing area are members of the Local; that the said fishermen sell their catch directly to dealers, and do not act collectively through the Local "in catching, producing, preparing for marketing, processing and handling their catch."

The indictment then charges that between May 1 and August 23, 1946, the petitioners engaged in a conspiracy to restrain trade in fresh fish and crustaceans by (1) fixing and maintaining arbitrary, artificial and non-competitive prices for fresh fish to be sold to dealers *by members of the Local,*[3] and (2) preventing dealers who do not agree to pay said prices to members of the Local from obtaining, selling or shipping any fish. The conspiracy, it is alleged, consisted of a plan to fix the prices to be paid members of the Local by contracts with the dealers; to "impose" such contracts upon dealers by refusing to sell to dealers who do not sign such a contract, by seeking

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[1]The opinion of the court below indicates that it was possible for the jury to find that there was a conspiracy between employee fishermen and employer fishermen [R. 2625]. The theory of the indictment was that the Local was composed entirely of independent businessmen; the case was tried and presented to the jury on this theory and none other. The court below itself found that the fishermen were joint adventurers and not employees and employers [R. 2603-6].

[2]There are also cannery fishermen, who deliver their catch to the canneries.

[3]The opinion of the court below states that the conspiracy was directed to the complete destruction of competition in prices in the area [R. 2609]. The indictment alleges and all of the evidence shows that the sole objective of petitioners was to get contracts for the price of fish sold by members of the Local.

through picketing and boycotting to "prevent" such dealers from receiving or shipping any fish, by boycotting and picketing any individual or concern delivering to, or accepting fish from, the usual place of business of dealers refusing to sign such a contract and by preventing fishermen from delivering fish at all until they have picketed non-signing dealers or paid a stipulated picket fee.[4]

It is charged that the effects of the conspiracy were, by the methods described above, to reduce the volume of fish sold, processed and distributed in interstate commerce; to prevent non-complying fishermen from fishing and non-complying dealers from receiving fish; and to fix arbitrary, non-competitive prices for fish sold under contracts by members of the Local.

On September 23, 1946, the petitioners filed a motion to dismiss. The motion was based upon the grounds that the indictment did not state facts sufficient to constitute an offense, and that the activities of the petitioners were exempt from the provisions of the Anti-Trust Law by reason of the statute authorizing fishermen marketing agencies (48 Stat. 1213, 15 U. S. C. A. 521, 522) and by virtue of the provisions of the Clayton Act (38 Stat. 731, 15 U. S. C. A. 17). The motion was denied [R. 21-25].

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[4]The opinion of the court below states that price fixing "was intermeshed with a purpose to exclude certain producers from the market and to prevent certain dealers from obtaining any fish" [R. 2610]. The theory of the indictment and the uncontradicted evidence is that the sole purpose of petitioners was to obtain contracts covering its members and that economic pressure through strike activities was exerted for the purpose of inducing individual dealers to sign such contracts.

When the cause came on for trial on February 18, 1947, the petitioners moved to dismiss the indictment and to strike the trial jury panel on the grounds that neither the panel from which the Grand Jury had been drawn nor the trial jury panel had been selected by a process designed to obtain juries representative of the community. The District Court took evidence on these motions, and on March 12, 1947, denied them [R. 25-30].[5]

The Trial.

At the trial, the following facts were developed:

A. THE ECONOMIC STATUS OF THE PETITIONERS.

1. *The Individual Fishermen.*

The membership of the Local is limited to *working* fishermen engaged in fishing on small boats. About 40% of the members own all or a share of the boats on which they fish; about 60% do not have any interest in a boat. Only five of the fourteen individual petitioners owned a boat at the time of the events in question. Six of the petitioners had never owned a boat [R. 1445, 1445-6, 1471, 1514, 1580-3, 1596-7, 1603-6, 1609-10, 1694-8, 1700, 1703-6, 1748-49]. The trial court rejected offers of proof showing that the average cost of the boats owned by petitioners was $1400.00 [R. 1455-6, 1471, 1580-3, 1596-7, 1694-6, 1603-6, 1697-8, 1700, 1703-6].[6]

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[5]This motion and the evidence in support thereof will be discussed *infra*, pp. 24 to 31.

[6]All offers of proof referred to in this petition were made after objections to questions were sustained as immaterial. The offers were all rejected on the same ground.

The members of the union are all manual workers deriving their income from their physical labor, not from investment in a boat or other equipment. Each member of the crew, including the owner, receives for his labor a share of the price paid for the catch. In addition, the owner of the vessel receives a share for its use [R. 425-427]. The share received for the boat does not produce any profit.[7] The owner of the boat applies that share to maintaining the boat and to his own extremely modest compensation for the several months which he (and not the non-boat owners) must spend each year in maintenance work [R. 1474-7, 1583, 1696, 1707]. Thus, those who own an interest in or all of a small boat use the boat, not for the purpose of earning a profit upon an investment, but as a necessary instrumentality for the performing of the physical labor from which they derive a livelihood [R. 870-3, 1180-1, 1355, 1370-5, 1404, 1423; Govt. Ex. 13, Deft. Ex. BB].

The petitioners offered to prove that the average annual earnings for the individual fishermen petitioners, including those who did and those who did not own boats, was slightly in excess of $1400.00; for those who did not own boats it was slightly below $1400.00 [R. 1498-1500, 1663-5, 1716-20]; the average annual earnings of all small boat fishermen range from year to year between $628.00 and $1,022.00 [R. 1688-91, Defts. Ex. GG, pp. 35-6].

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[7]The opinion of the court below refers to "profits" earned on boats [R. 2603-4]. But there is no evidence showing such profit and there is evidence to the contrary.

Out of season, fishermen must get other work to make a living. One dealer testified that he gave the small boat fishermen employment for this reason, saying:

> "A. Oh, yes, Heavens yes. We have the fishermen, and we either have to give them something to do or feed them, one or the other, so we hire them to work in the market, and we hire them to work on nets during the off season when there are no fish.
>
> Q. They have to do that in order to continue to eat during that off season?
>
> A. Well, they have to do something to eat * * *" [R. 933-934.]

The petitioners offered to prove that various government agencies have considered and treated fish prices paid working fishermen as wages; that the United States Department of Labor Conciliation Service and the Maritime Conciliation Service have intervened in disputes regarding such prices; that during the war, many of the fishermen union disputes were taken to the National War Labor Board, which Board rules that prices paid to fishermen, both boat owners, and non-boat owners, constituted wages; that the War Labor Board in more than 12 cases set the price of fish in War Labor Board awards as wages of the working fisherman [Defts. Ex. for Ident. X and X-1, and Defts. Ex. TT, pp. 14-15[8]].

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[8]Defts. Ex. TT is a written offer of proof which is dated April 21, 1948; it was submitted during the trial on April 22, 1948; by oversight it was not given an exhibit number. On May 4, 1948, the trial court signed a *nunc pro tunc* order making this offer of proof Defts. Ex. TT and stating that it was denied solely on grounds of materiality.

The petitioners further offered to prove through expert testimony that the economic position of the individual small boat fisherman, like that of all primary producers, including the farmer, places him at the mercy of the middleman; that an individual fisherman, like an individual employee or farmer, lacks bargaining power; that the individual fisherman as a primary producer of a perishable product, disposes of his catch under the conditions of a forced sale to dealers in an economically superior position; that collective action by fishermen tends to remove the otherwise great inequality in bargaining power [R. 1688-91, Defts. Ex. GG-1, pp. 2-8].

2. *The Local*

The Local is affiliated with the International Fishermen and Allied Workers of America, a C. I. O. union.

Of the 450 small boats which fish out of San Pedro, the Local has members on 175. Of these 175 boats, 25 are one-man boats, 105 are two-man boats, 25 are three-man boats, and 20 are four- or five-man boats. *Only 20* of the 450 small boats spend full time fishing for fresh market fish, 90 spend part time on fresh fish, and the remainder fish exclusively for the canneries [R. 1517-20].[9]

The common denominator for all members of the Local is the fact that they work as fishermen and receive a share of the catch for their labor. As far as membership in the Local is concerned, ownership of a

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[9]It is to be remembered that this case involves market fishing only.

boat is immaterial. The basic economic interest which the Local is designed to protect is the return on labor. Each member of the Local has one vote, and it, of course, is not operated for profit and pays no dividends [R. 1182-3].

The constitution and laws of the Local set up its organization, in form similar to that of the ordinary labor union, and it functions as a part of the labor movement [Defts. Ex. Y, Govt. Ex. 230, Govt. Ex. 402, R. 1378, Govt. Ex. 301, Govt. Ex. 233, R. 1545, Defts. Ex. DD]. In addition, the Local engages in many activities relating to the conditions under which its members market their catch [R. 1182-3, Defts. Ex. Y, Govt. Ex. 320, R. 1254-6, Govt. Ex. 201, R. 1309-17, 1395-6, Defts. Ex. O, R. 1419-20, 1549, 1551, 1667-78, Govt. Ex. 301, R. 1627-8, R. 1644, Govt. Exs. 307-220, R. 1759].

B. The Economic Status of the Dealer.

As distinguished from the fisherman who invests his labor in the fish he sells, the dealer invests his money in the fish he buys. The latter is the entrepreneur [R. 259]. He often advances money to the fishermen and secures the first refusal on the catch [R. 382-3, 417-8, 804, 810-11, 1623-4, 1713]. Most fishermen are either indebted to a dealer or are using a boat financed in whole or in part by a dealer [R. 349-51, 419-24, 516-17, 813-15, 851, 860-1, 905-6, 924, 931-2, 1475-6]. In short, the fisherman is the laborer—the worker engaged in catching fish and in selling it as a means of getting compensation for his labor; the dealer is the businessman

engaged in the buying and selling of fish—in seeking a profit on investments [see R. 1688-91; Defts. Ex. GG-1, pp. 6-8, 10].

C. Distribution, Price and Size of Catch.

Fishermen sell only to the wharfside dealers, who in turn resell to wholesalers, either in downtown Los Angeles or elsewhere. Wholesalers in turn frequently resell to other wholesalers. Fish pass through two to five hands before reaching the consumer [R. 1214-16].

In the fishing area involved here, there is a total of 16 wholesalers, the only possible purchasers of the fishermen's catch. At any given time all of the dealers in any port pay the same price for fish. The prices paid to the fishermen are fixed by the dealers and not by negotiations between the fishermen and the dealers[10] [R. 815, 819, 1478, 1599; Defts. Exs. E and F, R. 256-7].

The fisherman when he goes out to sea does not know whether he will catch any fish or if he does, whether he can sell it, and if he can, at what price [R. 338-9, 714-15, 1449-50, 1606, 1700, 1949]. The

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[10]The opinion below states that prices were fixed by open negotiations between the fishermen and the dealers [R. 2606]. One witness for the government testified to this effect [R. 279, 370-1, 380]. In addition to the mass of testimony to the contrary, which the opinion ignores, the court below disregards the fact that the trial court quashed subpoenas *duces tecum* directed to the books and records of the dealers, through which books and records petitioners offered to prove that at no time did any dealer in any locality pay a price different from that paid by any other dealer at the same time in the same locality [R. 860-4, 1289-90, 1423, 1501-4; Defts. Ex. TT, pp. 20-1].

price which dealers pay for fish fluctuates wildly, dropping as much as from 28¢ to 4¢ a pound in a single day [R. 708-13, 1450]. The fisherman's bargaining power is destroyed by a combination of factors. Under California law he must dispose of his catch before it deteriorates.[11] Outside of his vessel he has no storage space wherein he may keep the catch pending a favorable market, and, should he use the vessel for such a purpose, he could not continue to fish. Additionally, he must harvest his catch only during the season permitted by law[12] for the species available, and then only at the unpredictable times when the fish can be found in the area within reach of his small boat. Compared with the dealer, equipped with warehouse facilities, in which he stores fish for sale the year around, the bargaining power of the individual fisherman is nil [R. 289-90, 373-4, 396, 432-4, 565-8, 1216-23, 1486-8, 1608].

In the Southern California area, where there have been no agreements setting the price of market fish, there has been no overall increase in the size of the catch of market fish during the period from 1936 to 1946 [R. 1229-30]. During this time, the petitioners offered to prove, there had been price agreements for market fish in various other ports on the Pacific Coast [R. 1231]. In those other ports during the same

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[11]Violation of this rule constitutes a criminal offense and basis for revocation of the indispensable license to fish. California Fish and Game Code, Secs. 1061, 1064, 1068.

[12]The California Fish and Game Code controls and places severe restrictions upon the time, place and manner of fishing. Secs. 486, 487, 717, 717.5, 730, 731, 734, 736, 842, 842.5, 845, 846, 867, 868, 875-88, 900-7, 919-29, 940-59, 1063, 1065.

period, the size of the catch of market fish had increased from 500% to more than 1500% [R. 1229-30].

The petitioners offered to prove, through expert testimony, that the price paid to fishermen, like the price paid to farmers, does not determine the price to consumers; rather, low and fluctuating prices to fishermen tend to reduce the amount of fishing and, therefore, the volume of fish on the market; this in turn tends to increase prices to the consumer [R. 1688-91; Defts. Ex. GG-1, pp. 8-12]. Petitioners also offered to prove specifically that catastrophic decreases in the price paid to the fishermen had not resulted in any reductions in consumer prices [R. 1718-19; Defts. Ex. TT, pp. 16-17]. Finally, on this point, petitioners offered to prove that the consumer price of fish is determined by the price of other proteins [R. 1688-91; Defts. Ex. GG-1, pp. 8-9].

D. History of Collective Bargaining in the West Coast Fishing Industry.

The petitioners offered to prove that organization of fishermen on the Pacific Coast is known to have existed as early as 1886, when the Columbia River Fishermen's Union was organized in Astoria, Oregon, and was chartered by the American Federation of Labor; that the efforts to obtain an agreement with relation to prices were made as early as 1886; that the first strike over the question of fish prices of which there is any record occurred on April 1, 1896, and was conducted by the Columbia River Fishermen's Association; that continuously since the late

80's fishermen have organized at various ports on the Pacific Coast, have engaged in strikes and have secured agreements setting the price of fish, upon which price the individual fisherman's share is computed; that, in the Columbia River areas, in Alaska, and in other Pacific Coast ports, continuously from about 1900 on, there have been maintained price agreements covering all species of fish, and such contracts are now in full force and effect in these areas [Defts. Ex. TT, pp. 5-8].

In addition the petitioners offered to prove the following: Since 1936 contracts setting the price for fish have been in effect continuously in the Puget Sound and Northern California areas; such contracts as well as the others mentioned herein have been entered into with buyers by associations composed of working fishermen, some of whom were boat owners and some of whom were non-boat owners; the contracts deal with the prices for fish sold by members of the association to the contracting buyers. Where there has been organization and collective bargaining, the price to fishermen has increased, the size of the catch has multiplied many times and consumers' prices have not increased, but to the contrary, have generally decreased.

On the other hand, where there has been no collective bargaining, conditions have been chaotic, production has remained small and consumer prices have not decreased; prices have been subject to almost daily fluctuation, varying as much as 500% within a period of one, two, or three days. Kickbacks, short weight and other methods of further cutting down the earn-

ings of fishermen have been standard practices. Because of these conditions, the unorganized fishermen, including those fishing in the Southern California area have been and are heavily in debt to the dealers and to the canners and have been required to and have delivered all of their fish to the dealers or canners at whatever prices have been offered [Defts. Ex. TT, pp. 1-3, 16-17].

Petitioners offered to prove that collective marketing associations which establish by contract with dealers the price at which their members will sell their produce are common in the agricultural sphere; that such collective marketing associations have actually been sponsored by the Government; and that there are present in such associations, none of the manifestations of monopoly or restraint, *i. e.*, limitation of production, increased consumer prices, etc., which injure the public [Defts. Ex. GG-1, pp. 12-15].

In the San Pedro fishing area, organization of the large boats began in 1934, when the fishermen engaged in a strike in order to obtain a contract setting the price paid by canneries for sardines. About the same time new organizational efforts began in other West Coast ports [R. 1169, 1172-3].

Organization drives continued on through the years and were particularly spurred on by the decision handed down in 1943 by Judge McCulloch of the Federal District Court of Oregon (the trial judge whose decision was affirmed by this Court in *Columbia River Packers Association v. Hinton,* 315 U. S. 143) holding that a minimum price agreement entered into by a sister local of the one here involved

did not violate the Sherman Act. It was as a result of this decision that in 1944 small boat fishermen were organized in the Southern California area [R. 1183-6, 1406-7].

E. The 1946 San Pedro Strike and the Proposed Contract.

In 1946 the Local requested of the individual dealers that they sign contracts setting the price for fish sold by members of the Local to said dealers. The primary object of the strike, embodied in the proposed contract, was a method by which the members of the Local would be assured of a price for their catch before they put out to sea. Each dealer was asked to sign a separate individual contract with the Local[13] [R. 193, 1532].

The proposed contract, which the dealers refused to execute, dealt with marketing problems and prices to be paid to members of the Local. Dealers who signed were to be given equal and first preference in the purchase of fish caught by members of the Local. Payments were to be made weekly. The Local was to furnish fish weighers and inspectors of weighing apparatus. OPA prices were to be minimum prices for

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[13]The opinion of the court below states that the purpose of the conspiracy was to "force uniform action by dealers and fishermen to establish a stabilized arbitrary price for fresh fish in the area" [R. 2598]. The evidence, without any conflict whatsoever, establishes that the Local sought only to obtain contracts with individual dealers setting prices for fish to be sold by the Local's members. There was no attempt to set a price applicable to non-member fishermen or to require the dealers by agreement among themselves or otherwise to establish uniform prices for all fishermen in the area.

fish delivered by members of the Local even after controls were removed; where there were no OPA prices the prices were to be set by agreement, and, if necessary, arbitration. All prices were subject to re-negotiation on twenty-four hours' written notice, with arbitration in case of disagreement. For all vessels operated by members of the Local out at sea at the time that the notice was given, the contract prices were to remain effective until their return [R. 1570-3].

The proposed contract was not a "closed shop" agreement. The dealers under its terms remained free to buy fish from non-members of the Local without regard to the prices or the other terms provided in the proposed contract. The dealers acknowledged that the Local's demands and the prices proposed were reasonable but refused to execute the contract on the grounds that such execution would violate the anti-trust laws [R. 1329].

Shortly after the strike started, the Local proposed a new basis for settlement, one designed to achieve its main objective, *i. e.*, that the members of the Local should know what price they will receive before they go fishing. The Local proposed that prior to the departure of a fishing vessel operated by members of the Local, the anticipated catch of the vessel shall be offered to a dealer at a fixed price, that the individual dealer shall be at liberty to accept or reject this price, or to arrive at another price by negotiations on the spot, and upon agreement the vessel will depart for fishing; that upon return of the vessel the load of fish will be distributed to the dealers who have

agreed in advance to accept the fish at the stated price for that particular trip [Defts. Exs. A and B]. The attorneys and the parties at first agreed that this proposed contract did not violate the Sherman Act. The proposed contract was accepted by the Local with the recognition on its part that the execution of this agreement would constitute a distinct victory for its objectives [Defts. Ex. P, Govt. Ex. 224]. The dealers on the other hand refused to execute the proposed agreement and instead stated that this agreement, which their own attorney believed did not constitute a violation of the Sherman Act, was in fact in violation of that Act [Defts. Ex. C, R. 319-55].

F. Strike Activities and Their Effect Upon Commerce.

The Local picketed the dealers from May 20 to July 1, 1946; some of the dealers ceased operations, others did not. During that period very little of the fish caught in Southern California waters was delivered to the dealers who refused to sign an agreement [R. 131-6, 313-18, 159-60, 397-400, 857-62, 1481-2, 1489]. There was one threat that an express company would be picketed if it delivered fish to the struck dealers at their wharfside places of business [R. 161-4, 171, 1484-5, 1492-3]. However, during the entire strike the express company did continue to deliver fish to the dealers at the company depot, where the fish was picked up by the dealers and taken to the wharf where their establishments were located [R. 168-73, 401-2]. Similar procedure was followed with respect to other companies delivering fish [R. 172-3, 401-2, 564-5, 642-3, 656-7, 820-3]. Dealers

continued to ship fish during the period of the strike [R. 168-73, 401-2]. Shipments of fish in and out of the area were not interrupted [R. 168-73, 172-3, 401-2, 564-5, 584-5, 642-3, 656-7, 820-3].

Fishing continued during the strike but shifted to Newport Beach, out of which port all fishermen in the area had fished during the war [R. 177, 445, 453, 493-4, 860-2]. Fishing also continued out of San Diego [R. 1556-7]. Some fishermen hauled their catch to Los Angeles [R. 1466].

There was some evidence of threats of violence on the part of the petitioners but all threats were denied [R. 876-92, 1485]. During the strike the Local issued clearance cards to fishermen to designate that the holders had complied with the policy of the organization. To get a clearance card the fisherman had to stand picket duty. If a fisherman went from one point to another, his card indicated that he had complied with the policy of the organization [R. 1552-3, 1573-5].[14] Many boat crews went fishing without getting clearance cards; nothing was done about it by the Local except to place those boats on an unfair list. The effect of placing a boat on an unfair list was that the Local members would not give fishing information to its crews and would have nothing to do with members of the crew—that is, they

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[14]There was a running objection to all of the testimony concerning the methods used by the Local in connection with the dispute, on the ground that the methods used were incompetent, irrelevant and immaterial and that the only question was the legality of the agreement which they sought to put into effect [R. 406-13].

"cut them dead" [R. 1452, 1553, 1546-7, 1613-17, 1638-9, 1651-8, 1680-4, 1634-5; Govt. Ex. 328]. Such "unfair" boats got fuel and other supplies and went fishing without interruption [R. 1560-1].

There is no evidence that the strike reduced the total volume of fish moving in interstate commerce, although it did affect the delivery of fish to certain dealers [Govt. Exs. 201, 302; R. 436, 168-73, 401-2, 564-5, 584-5, 642-3, 656-7, 820-3, 1035-7, 1052-6, 1624-5]. There was evidence that there was no overall reduction in the total volume [R. 1035-7, 1052-6, 1624-5]. Petitioners offered to prove that during the strike the total commercial catch in the fishing area here involved was substantially higher than it had been in any one of the preceding six years and that the actual catch of market fish had not been reduced by reason of the strike [Defts. Ex. GG, pp. 17-27; R. 1688-91].

Furthermore, petitioners offered to prove that at the time of the strike there were approximately 229 wholesale fresh fish dealers in the Southern California area; that these dealers customarily purchase about five times as much market fish brought into Southern California from outside of the fishing area here involved as is caught in the said area; that during the strike each of the wholesale fish dealers in Southern California was able to and did buy all of the fish that he desired or could handle. No orders went unfilled because of lack of supply. There was no unfilled demand and there was no change in the normal or usual supply of fish in the Southern California area or in any other area in the five Western states referred

to in the indictment [Defts. Ex. TT, pp. 17-19; see also testimony R. 457-65, 473-9, which was stricken and then rejected when submitted as an offer of proof, Defts. Ex. TT, p. 19].

G. Instructions and Other Trial Proceedings.

At the conclusion of the Government's case, the petitioners moved to strike certain exhibits and testimony and also to dismiss the indictment, or, in the alternative, for a nonsuit. These motions were denied [R. 30-3].

Before the case was submitted to the jury the petitioners moved for a judgment of acquittal; this motion was likewise denied [R. 1775-7].

The trial court denied the petitioners' requests that the jury be instructed that the Sherman Act does not forbid the establishment of prices for the products of their labor by combinations of working original producers and that this principle applies to workers, fishermen and farmers [Defts. Proposed Instruction No. 5, R. 41-2; No. S-8, R. 56-7; Nos. 13, 14, 15, 16, 17, 18 and 19, R. 48-51].

Over petitioners' objection [R. 1870-7][15] the trial court instructed the jury that Section 6 of the Clayton Act does not apply in the absence of a labor dis-

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[15]The trial court ruled that the argument presented might be considered as objections without being specifically set forth in objection form [R. 1868].

pute over terms and conditions of employment and involving or affecting an employer-employee relationship [R. 1943-5]. Rejected instructions proposed by petitioners were predicated on the proposition that the said Section 6 is applicable wherever those who claim its benefits earn their livelihood in occupations in which their own labor is the principal factor [Defts. Proposed Instructions Nos. 10 and 11, R. 46-47; No. 18, R. 50-51; No. S-4, R. 53-4; No. S-5, R. 54; No. S-6, R. 54-5; No. S-14, R. 60-2].

Over petitioners' objections [R. 1853-58] the trial court instructed the jury that to come within the terms of the Fishermen's Marketing Act, an association must be formed for the purposes of collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by its members; that then it may itself or as sales agent for its members sell fish caught or to be caught by said members [R. 1939-42]. The trial court refused petitioners' proposed instructions: First, that an association may qualify under the Fishermen's Marketing Act by engaging in collective marketing only; and second, that an association engaging on behalf of its members in collective bargaining with reference to price is collectively marketing within the meaning of the Act [Defts. Proposed Instruction No. 12, R. 47; No. S-12, R. 59-60, and No. S-13, R. 60].

The trial court, over petitioners' objections [R. 1850-2, 1916-17], instructed the jury to the effect

that if petitioners are not employees and if they combine to fix prices, the combination is illegal *per se* under the Sherman Act [R. 1940, 1946]. The court refused to give petitioners' proposed instructions which would have permitted the jury, in determining whether the proposed contracts did or could lead to the evils which the Sherman Act seeks to suppress, to take into consideration various economic factors, such as the economic conditons and problems peculiar to fishing and the marketing of fish, the practices which have prevailed in the fishing industry, the effect of petitioners' proposed contracts upon consumer prices, whether said proposed contracts tend to limit or further trade, the reason for their proposal, and other matters affecting the public interest [Defts. Proposed Instructions No. 6, R. 42-3; No. 8, R. 44-5; No. S-16, R. 62-3; No. S-17, R. 63-4]. In this connection, the trial court also refused to instruct the jury concerning the limitations and restrictions placed upon petitioners by California law [Defts. Proposed Instructions Nos. 2 and 3, R. 38-40].

With reference to petitioners' strike activities, the trial court instructed the jury, over the objections of petitioners [R. 1829 *et seq.*] that contracts to fall within the protection of the Fishermen's Marketing Act must be "arrived at by free and voluntary negotiations;" that a contract which is achieved "by practices and tactics which are not free and voluntary" amounts to the fixing of price "by one party to the

contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade" [R. 1942-3]. The trial court did not give the petitioners' proposed instructions to the effect that the evidence of picketing and boycotting might be considered solely for the purpose of determining whether petitioners had entered into a combination to obtain the proposed contracts and that petitioners' guilt or innocence turned upon the validity of said proposed contracts [Defts. Proposed Instructions No. 9, R. 45-46; No. S-7, R. 55-6; No. S-9, R. 58].

On May 7, 1947, the jury returned verdicts of guilty as charged against each of the petitioners [R. 67-8].

On May 12, 1947, petitioners moved for arrest of judgment, for a judgment of acquittal or for a new trial on the following grounds: The District Court had erred in denying their prior motions to dismiss and for acquittal; the verdict was contrary to the weight of the evidence; the verdict was not supported by substantial evidence; the court had erred in sustaining objections, in admitting testimony over objections and in its charge to the jury. This motion was heard on May 21, 1947, and denied [R. 70-3].

Immediately thereafter, the court ordered the petitioners to pay the fines totaling $12,090.00 and to stand committed until the fines were paid [R. 73-98].

Evidence in Support of Challenge to Jury Panels.

Both grand jurors and petit jurors are drawn from panels selected from lists of names originally submitted by the jury commissioner [R. 1968-9, 1986-7, 2053]. The number of names thus submitted by the jury commissioner from 1943 to the time of the trial total 6712 [R. 2122-49].

Of this number, 1680, or 25%, were obtained by the jury commissioner from the Southwest Blue Book [Govt. Exs. 4-H and 4-I, R. 2132-5, 2147-8]. This Blue Book, to which the jury commissioner's wife is a subscriber, is "the standard society register of Southern California" with "special sections devoted to the year's marriages, clubs and other features" [Defts. Ex. U, R. 2129, 2147]. Another 154 names, or 2%, came from two women's clubs and the Congress of Parents and Teachers [Govt. Exs. 4-C, 4-E and 4-F, R. 2132, 2135, 2137, 2144]. The remaining 4878, or 73%, were taken from the telephone directory, except that of this number something less than 1,000 were taken from a list of automobile owners prepared for use by insurance agents for the solicitation of insurance [Govt. Exs. 4-A, 4-C, 4-D, 4-G, 4-K and 4-J, and Defts. Ex. P, R. 2075, 2131-3, 2135-6, 2138-41, 2143-4, 2148-9].

For the years prior to 1943, lists of proposed jurors and the sources from which they were selected were not available. However, the sources used during the period from 1943 to 1947 were typical of those used during the preceding years [R. 2159-60]. In addition during the preceding period names were obtained from golf and country, university and social clubs and from personal property assessment lists [R. 2126-7, 2150]. During the

sixteen year period preceding the trial, 20,000 to 24,000 names were selected, of which, in addition to sources of the kind referred to above, only "a very few names" were secured from one labor union, and there was a small list of colored people obtained from a colored minister and 24 names of Japanese from a Japanese minister [R. 2130-1, 2150-2, 2158, 2161, 2164].

The lists of names prepared by the jury commissioner are turned over to the clerk of the court, who then mails questionnaires to the persons listed [R. 2041-3]. When questionnaires are returned, the names of those persons appearing to have the legal qualifications for jury service are placed in a master jury box, from which names are drawn both for petit and grand jury panels [R. 1968-9, 2053].

The names of jurors who have served, or who have been excused from service for some reason which would not disqualify them for future service, are placed in a file for later use. The names in this file, which have been accumulated since 1925, number twenty-five to thirty thousand [R. 1996-7, 2026-8]. At the same time that questionnaires are sent out to persons named on new lists submitted by the jury commissioner, questionnaires are also mailed to a number of persons whose names are selected from the accumulated files of persons with prior jury service or an excuse therefrom and who have not served during the preceding three to five years. The processes described above are followed for all questionnaires [R. 1996-7, 2041-3].

Thus, the grand jury which returned the indictment against petitioners and the petit jury which convicted

them were drawn from panels selected from the lists submitted by the jury commissioner and from lists of past veniremen who had originally been selected in the same manner [R. 1970-1, 1978-9, 1988].

In the Superior Courts of California, names of persons for possible jury service are drawn from the lists of registered voters [R. 2190-2200]. These lists contain 1,800,000 names as compared with 562,000 in the telephone book. It is a list representative of the entire population. There being no poll tax in California, the list is in no wise weighted from an economic standpoint [R. 2223, 2248-9].

The results of the method used in the trial court herein were analyzed by an outstanding statistician and sociologist, an expert on sampling techniques designed to secure reactions from a cross-section of a community [R. 2174-9, 2189-90]. He made an occupational survey and analysis of jury panels selected in 1946 and 1947 up to the time of the trial. His purpose was to ascertain whether the panels could possibly have been selected by a method designed and calculated to obtain a cross-section of the community. The problem he dealt with was not whether such a cross-section had actually been achieved; rather it was whether in the panels chosen there was so great a variance from a cross-section of the community as to demonstrate that the method of selection was one which *necessarily* resulted in non-representative panels [R. 2182-6, 2271-8].

Key to this approach, according to the testimony of the expert witness, is a determination as to whether the panels show a tendency "to overemphasize one group

and . . . to underestimate another group over and over again" [R. 2422-3]. Representativeness is achieved when all groups of persons, otherwise qualified, have a substantially equal chance for selection in accordance with their numerical proportions in the community [R. 2428-2430-1].

After the occupation of each person on the panels was ascertained, various tabulations thereof based upon occupational classifications utilized in the United States Census were prepared. These tabulations were then compared with census figures for the year 1940, the latest exact statistics available [R. 2227, 2234, 2238, 2241-7, 2257-8]. However, it is known that in 1940, in Southern California the percentage of professionals and businessmen was greater, and the percentage of craftsmen, operators and laborers was less, than at the time of trial. Thus, these 1940 statistics, when applied in 1946 and 1947, showed more persons in the higher economic brackets and less in the lower than was actually the case [R. 2263-4].

Even using the 1940 figures for comparison, the 1946 and 1947 panels included a consistent and extreme overrepresentation of businessmen and persons in the higher economic categories together with corresponding underrepresentation of workers and persons in lower economic classifications [Defts. Ex. W-2, R. 2280-3, 2291; Defts. Ex. X-2, R. 2296-9; Defts. Ex. 6-2, R. 2304; Defts. Ex. Z-2, R. 2309-10; Defts. Ex. AA-2, R. 2310-11; Defts. Ex. BB, R. 2311-12; Defts. Ex. CC-2, R. 2311-12; Defts. Ex. DD-2, R. 2312-15; Defts. Ex. EE-2, R. 2315-16; Defts. Ex. FF-2, R. 2316; Defts. Ex. GG-2, R. 2316; Defts. Ex. HH-2, R. 2316-17; Defts.

Ex. II, R. 2317]. An examination of the Summary for the 1947 jury panels [Defts. Ex. II, R. 2317] reveals gross discrepancies from a representative group, characteristic of all of the tabulations. The number of persons involved total 741. If proprietors, managers and officials were proportionately represented, they would number about 88 (1940 census figures); there were 240—an overrepresentation at the rate of almost 3 to 1, even on the basis of the 1940 census figures. On the other hand, there would have been about 37 laborers instead of the 6 listed; there would have been about 124 operatives and kindred workers instead of 35; there would have been about 77 service workers, not including protective and domestic workers, instead of 16. Thus, these three groups were represented by 56 persons where there should have been approximately 238, an underrepresentation in the lower brackets at the proportion of about 4 to 1.

The grand jury which returned the indictment contained no laborers, no working men, no representatives of those in the lower economic categories constituting considerably more than 50% of the population. Fourteen out of 19 of its members were generally classified as businessmen. On the panel from which the grand jury was selected 21 out of 33 were in this category [Defts. Exs. W-2 and X-2, R. 2280-3, 2291, 2296-9].

Nor does this disclose the entire picture. Among the businessmen there is a concentration of men engaged in finance, insurance and real estate completely disproportionate to their numbers in the community. On the other hand, laborers on an overall basis are underrepresented at a ratio of over eight to one, so that instead of having an even chance of getting a laborer on the jury, the odds are eight to one against it [R. 2325-7].

Housewives and retired persons are treated as such in one portion of the survey; in another they are classified according to the occupations of their husbands and their last occupations prior to retirement, respectively. Whichever method is used, the pattern of non-representativeness is unchanged [R. 2408-9, 2448-50].

Even where a proper method, designed to secure a cross-section of the community is followed, the results will vary considerably, the expert witness testified. However, the variations always fall within certain limits that have been scientifically ascertained. In this case the departure from these limits is so great, that the method used must have been one which necessarily lead to unrepresentative results [R. 2318-40, 2467-8]. In fact, the methods used in this case are to an astounding degree less likely to secure a representative jury than were those used in the case of *Smith v. Texas*, 311 U. S. 122, in which case it was held that the under-representation of Negroes was so repetitive and aggravated that it could not be attributed solely to chance [R. 2321-2].

Assuming that the method used for selection of jury panels were unknown, the results of the study conclusively demonstrate, according to the testimony of the expert witness, that whatever the method, it is not calculated to accomplish the selection of representative panels. However, the results are completely compatible with the method actually used and which in this case *is* known. There need be no speculation as to reasons why the panels selected were consistently and grossly overweighted with those in the higher economic categories and deficient in the numbers of those in the lower brackets [R. 2402-3].

In the first place, the expert testimony showed, the use of a society Blue Book, or country club or social club, as a source of 25% of the names, in and of itself, assures the non-representative character of the selection. It means that one out of every four prospective jurors is drawn from a tiny segment of the community, a segment composed of persons in the higher economic brackets [R. 2366-86]. The use of a list of automobile owners prepared for insurance brokers also tends to exclude those in the lower economic brackets [R. 2341-2].

It is conceivable that this discriminatory selectiveness might have been minimized by the manner in which the balance of prospective jurors were chosen. But this was not accomplished by the placing of a handful of trade unionists, Negroes and Japanese on the lists [R. 2418-19]. Nor was it achieved by the use of the telephone directory as the source for the majority of the names chosen.

The telephone directory itself is biased upwards economically. It is a fact known to statisticians, and not disputed in the record here, that the lower economic groups are underrepresented in the telephone directory to a great extent. Thus, while the use of the telephone directory extended the representative character of the jury to economic strata below those in the social register, it continued, and, in fact, aggravated the discrimination against those in the lower economic brackets [R. 2231-3, 2368-9, 2439].

Finally, the use of names of persons selected for possible jury service running back to 1925 further strengthened the discriminatory pattern. This is so because of the increase in the percentage of workers in the Southern

California population since 1925. Thus, between 1935 and 1946 the percentage of workers employed in manufacture practically doubled. For these and other reasons, such as the greater tendency of workers to migrate, the use of old lists rendered the method of selection even more unrepresentative than it would otherwise have been [R. 2327-31].

To summarize briefly, the sources of jury selection started with a base, the telephone directory, which to a great degree failed to furnish a cross-section of the community, discriminating against those in the lowest economic categories. This discrimination extended upward on the economic scale, so that only those in the higher economic groups were reached, and intensified the discrimination at the lower levels by the selection of about one-fourth of the jury panel from among socialites. These evils, in turn, were aggravated by the use of old lists running back to 1925 additionally tending toward the lack of representation of operatives, laborers, and other workers. The fact that the method of selection could not secure a cross-section of the community is further established by its results, which confirm the unrepresentative character of the procedure used.

The Motion to Dismiss and jury challenge were denied. Thereafter, a jury was selected; the petitioners exhausted the peremptory challenges allowed by the court and requested additional challenges, which request was denied [R. 2574-8].

Statement as to Jurisdiction.

The jurisdiction of this Court is based on the Act of June 25, 1948, Chapter 646 (62 Stat. 869), New Title 28 United States Code Judiciary and Judicial Procedure, Section 1254, Subsection 1.

Statutes Involved.

(1) Sherman Act, 26 Stat. 208, 15 U. S. C. A., Sec. 1, as amended.

"§1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of mini-

mum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693."

(2) Clayton Act, Sec. 6; 38 Stat. 731, 15 U. S. C. A., Sec. 17.

"Antitrust laws not applicable to labor organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

(3) Fishermen's Marketing Act, 48 Stat. 1213, 15 U. S. C. A., Sec. 521.

"§521. *Fishing industry; associations authorized; aquatic products defined; marketing agencies; requirements.*

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term 'aquatic products' includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

and in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members."

Questions Presented.

1. Under the provisions of the Sherman Act, as modified by Section 6 of the Clayton Act and by the Fishermen's Marketing Act, is it a violation of law for an association of working fishermen to seek and to enter into contracts with individual dealers establishing the price at which the association's individual members sell their catch directly to said dealers?

2. In a trial in which defendants are charged with a criminal violation of Section 1 of the Sherman Act in that they conspired, through and as an association of working fishermen, to obtain contracts with individual dealers establishing the price payable by said dealers for fish sold directly by the individual members of the association, is it material and relevant that such fishermen basically invest labor and not capital in their fishing operations, that in the absence of such collective bargaining contracts they are forced to sell their catch at distress prices, thereby creating conditions of severe hardship for the fishermen and that the effect of collective bargaining agreements is to increase production, to raise prices to the working producers covered by the agreements without fixing market prices and to lower prices to consumers?

3. Are interruptions in production and in the flow of commerce, resulting from picketing and other activities ordinarily associated with a strike, within the purview of the Sherman Act where the objective of such activities is the obtaining of contracts which do not themselves violate that Act?

4. Is jury selection consistent with the proposition that a jury should be a representative body drawn from a

cross-section of the community where a substantial percentage of the persons asked to serve are selected from society registers and clubs and the balance are obtained primarily from the telephone directory and from lists, originally obtained from similar sources, accumulated over a period of twenty years, in a rapidly growing, changing community, and where the resulting panels and juries show consistent and extreme over-representation of persons in the higher, and under-representation of those in the lower economic classifications?

Reasons for Granting the Writ.

The court below decided important questions of federal law which have not been, but should be, settled by this Court. It decided federal questions in a way in conflict with applicable decisions of this Court.

The issues presented by this petition reach, for the first time in adjudicated cases, into the economics of a neglected phase of our national food production. Although the appellate court's conception of the issues was such as to treat fishermen as jobbers and middlemen, the problems presented cannot be disposed of by verbal similarities or mechanical classification. The common law, as well as modern economics, long recognized that original producers of food are of a different order from others in the economic life of a society, and must be distinguished from commercial dealers who receive the commodity for processing and distribution after its original production. Congress by express statutory exemptions from the Sherman Act has recognized that fishermen, like farmers, must be allowed to unite and act in their own self-interest, if our economy in the most vital of all productions is to be reasonably maintained.

The petitioners have so combined here. As working fishermen they seek by collective bargaining to enhance the return for their labor, received by them in the form of prices for the fish they catch. The contracts they desire establish the price of their labor by setting the prices for that fish.

The petitioners do not rely upon the existence of a technical employer-employee relationship between themselves and the dealers; they do assert that their livelihood is derived solely from labor, not investments, and that this economic reality may not be disregarded in a prosecution under the anti-trust laws. It is not charged nor was there any proof that they sought to restrict to themselves the opportunity to fish and to sell the fish caught or that it was their purpose to establish prices to be paid to fishermen who were not members of their association; the Local did seek to obtain contracts covering the price of fish caught and sold by its members. It is not charged nor was there any proof that the petitioners combined with dealers or others for any purpose whatsoever; the petitioners, all working fishermen and their representatives, associated themselves together for purposes limited to their own self-interest. It is not charged nor was there any proof of any attempt or plan to contract for or otherwise affect prices at the consumer level, or in fact at any point other than that of the sale from the members of the Local to the dealers; all of the activities charged or proven against petitioners were those of an association working producers designed to secure increased remuneration for work performed.

This Court has never passed upon the right of working fishermen, combining in their own self-interest, to establish by contracts the prices at which they individually shall sell their catch to individual dealers. This issue is one of critical importance, first, to the working fisherman whose average annual earnings, in the war years, were about fourteen hundred dollars; second, to the Southern California fresh fish industry which in volume of production and economic health has lagged far behind those areas in which there have been in existence collective bargaining agreements of the kind under attack here; and, third, to consumers for whom the supply of fish has remained low and the price high because of the restrictions upon fishing resulting from the chaotic and depressed conditions in the Southern California section of the industry.

This case presents the important question whether, despite the Clayton Act, the Fishermen's Marketing Act and the re-evaluation of the purposes of the Sherman Act in the light of the Norris-La Guardia Act, fishermen as original worker producers charged with a price-fixing restraint of trade may be deprived of the opportunity to prove economic facts designed to establish that their activities have not and can not result in the evils at which the Sherman Act is directed. Since the adoption and development of the *per se* rule for all price-fixing arrangements on behalf of processors, manufacturers, distributors, traders and the like, its applicability to original working

producers, like the fishermen petitioners here, has never been considered. The *per se* rule is predicated upon the economic reality that the price-fixing at which it is directed necessarily raises consumer prices and restricts trade. Is that same rule to be automatically transferred into an area in which economic reality points in the opposite direction, particularly where this fact has been recognized and embodied in legislation modifying the Sherman Act? The answer to this question vitally concerns not only the fishermen, but the millions engaged in agriculture and related pursuits.

Finally, as far as this aspect of the case is concerned, the decision below disregards the most recent decisions of this Court, and reverts to the approach, sometimes previously adopted, that the Sherman Act is designed to police interstate commerce. Discarded is the concept now clearly delineated that the Sherman Act is not intended to deal with interruptions of production or of the flow of commerce as such, but is concerned with economic evils flowing from price-fixing and limitations upon competition, which generally interact, simultaneously reducing the volume of goods available to, and raising prices for, consumers. The court below inverted these principles; economic considerations were cast aside; the facts relating to interruptions of commerce were held decisive.

The manner of selection of the jury panels, from which were drawn the Grand Jury which indicted and the petit jury which convicted petitioners, also presents issues of

great importance. This Court should determine whether the selection from a social register of 25% of the names added to the jury lists, during the three-year period preceding the indictment and trial (this being the only period for which precise records are available), may be countenanced as a minor deviation from the processes of jury selection demanded of a democratic society.

The decision below characterizes as an attack upon the jury system itself a challenge based upon the fact that the method of jury selection favored the well-to-do, the rich and the elite of society and that it discriminated against the poor and a large section of "ordinary" American workers. The petitioners relied upon decisions of this Court designed to relegate such methods of selection to the ashcan of history, as totally inconsistent with the democratic process. The court below has undermined, as destructive of the jury system, the very principles which this Court has stated are necessary for its preservation as a democratic instrumentality.

The resolution of the issues presented by this case will have a decisive effect on the economic well-being of the petitioners and those they represent. It will settle important questions concerning the meaning and application of the Sherman Act, the Clayton Act and the Fishermen's Marketing Act. It will affect the administration of justice in a substantial manner. These issues should be heard and resolved by this Court.

I.

Under the Sherman Act, as Modified by Section 6 of the Clayton Act, and the Fishermen's Marketing Act, the Local, as an Organization of Working Fishermen, Has the Right to Seek and to Enter Into Contracts Establishing the Price at Which the Fish Caught by Its Members Is Sold by Said Individual Members Directly to the Individual Dealers.

A. The Law Construed in the Light of the Provisions and Legislative History of the Sherman Act, Section 6 of the Clayton Act, the Norris-La Guardia Act, the Capper, Volstead Act and the Fishermen's Marketing Act Substantiates Petitioners' Contention That the Proposed Contracts Do Not Infringe Upon the Sherman Act.

The trial court predicated its instructions to the jury on the theory that fishermen who are working original producers violate the Sherman Act if they combine for the purpose of fixing the prices for their products through collective bargaining [R. 1933-5]. The petitioners' proposed instructions to the effect that the Sherman Act, as now modified by Section 6 of the Clayton Act and by the Fishermen's Marketing Act, does not forbid such combinations were refused [Defts. Proposed Instructions No. 5, R. 41-2; Nos. 10 and 11, R. 46-7; Nos. 13-19, incl., R. 48-51; Nos. S-4, -5, -6, R. 53-5; No. S-8, R. 56-7; No. S-14, R. 60-2].

Fishermen are original producers; a product comes to being in their hands for the first time, as a result of their labor. Like farmers, their produce has no previous owner and it reaches the fisherman by *labor,* not by pur-

chase. Processors and manufacturers, on the other hand, prepare, fashion and assemble their products from other products; and although labor is utilized in such process, it is usually not the principal ingredient, and it is usually the hired labor of others. In the case of farmers and fishermen, the principal ingredient is labor,—usually as in this case, the labor of the man who disposes of the product, not the labor of his employee.

The dealer's "net" is profit on a sale. He has laid out money and has taken back a larger sum. His venture is dollars. The manufacturer is much in the same situation. He has risked money for plant, materials and wages. His "net" is the overplus of the return over his ventured capital. Working fishermen, farmers, and similar original producers lay out a minimum of money for tools, equipment and other instrumentalities. Their expenditure is labor. Their return is not an overplus; it is not a "margin." Their return is essentially compensation for their labor.

The Sherman Act was not addressed to the fixing of prices for the sale of the produce of their labor by combinations of working original producers acting in their own interest; it was the purpose of Section 6 of the Clayton Act (38 Stat. 731, 15 U. S. C. A., Sec. 17), as further clarified by the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. A., Secs. 105-115), to set forth explicitly this legislative intention; and the Fishermen's Marketing Act (48 Stat. 1213-14, 15 U. S. C. A., Secs. 521-2), modeled

after the Capper-Volstead Act (42 Stat. 388, Chap. 57, pars. 1 and 2, 7 U. S. C. A., Secs. 291 and 292), specifically applied this principle to fishermen.

The history of the application of the Sherman Act to combinations of working original producers, such as farmers and fishermen seeking to increase the price of their produce, strikingly parallels the efforts of organized labor to establish its freedom from the anti-trust laws when acting in its self interest. This is not a coincidence. The Sherman Act deals with basic economic problems and relationships. The economic position of laborers employed by others is similar to that of those who work as farmers or fishermen, but it is different from that of those who invest their capital for profit in processing, manufacture, distribution and similar enterprises.

These economic facts were recognized by the author of the Sherman Act. After introducing his original bill which was aimed directly at the raising of prices through combinations and conspiracies to prevent full and free competition, Senator Sherman offered, and the committee of the whole adopted without the formality of a roll call, a proviso exempting labor and farmers' organizations (Berman, Professor Edward, "Labor and the Sherman Act," Harper's 1930, Chap. 2, p. 21).

Later in that session of Congress, the difficult task of distinguishing between "good" and "bad" combinations to fix prices was avoided by dropping the original idea and by redrafting the bill to apply the common law principles

of restraints of trade to interstate commerce (*Apex Hosiery Co. v. Leader,* 310 U. S. 469, 489, 498).[16] Since the common law prohibitions upon restraints of trade were not concerned with wage fixing combinations or the setting of prices by original producers, it was no longer necessary to spell out those exemptions which the history of the legislation indicates was intended.

The common law doctrines of restraint of trade did not invalidate action "by producers themselves to raise prices." It was directed at "traders exclusively." For "the enhancement by laborers of the prices of their own labor or the enhancement by producers of the price of their own produce, does not exploit the public at large because the vast majority of producers are also consumers" (Boudin, Louis B., "The Sherman Act and Labor Disputes," 39 Col. Law Rev. 1283, 1307 and 40 Col. Law Rev. 14, 26-7; *cf.* Fetter, Frank Albert, "Masquerade of Monopoly," Harcourt Brace & Co. (1931), pp. 247-50). Collective action among producers tends to eliminate the wasteful spread between the producers' return and the consumer price (*Minnesota Wheat Growers v. Huggins,* 162 Minn. 8, 203 N. W. 420; *Dark Tobacco Growers Assn. v. Dunn,* 150 Tenn. 614, 266 S. W. 308). All of this was recognized in the common law (Fetter *op. cit.,*

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[16]In footnote 10 at 310 U. S. 489, the court quotes from Senator Hoar at 36 Cong. Rec. 522, Jan. 6, 1903: "It was believed that the phrase 'in restraint of trade' had a technical and well-understood meaning in the law." The "law" referred to is, of course, the common law.

pp. 247-50). Statutes relating to prices of agricultural producers and to wages were not part of the law of restraints of trade (Boudin, *op. cit.*, 40 Col. Law Rev. at p. 32; *cf.* Berman, Professor Edward, "Labor and the Sherman Act," Harpers (1930), Chap. 2).

However, upon the enactment of the Sherman Act, the courts did not look to the common law to determine the meaning of the new legislation. Instead, directing their attention solely to the language of the Act, the courts held that it applied to *all* restraints, even those resulting from labor activities seeking higher wages and improved working conditions (*Loewe v. Lawlor,* 208 U. S. 274). Obviously the law *as so interpreted* gave no exemption of any kind to farmers or other working producers.

Organized labor's long fight against this interpretation of the law is well known (*Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, 801-6). What is perhaps not such common knowledge were the attempts of the farmer to overcome the restrictions placed upon him by the law as it was first construed. When at the turn of the century agricultural combinations, organized to strengthen the farmer's bargaining power, became prevalent, these groups were attacked on the charge that they restrained trade in violation of the Sherman Act, and of state anti-trust laws. In order to free farmers from threatened prosecution under state anti-trust laws, some states adopted legislation exempting agricultural organizations therefrom.

When these statutes have been challenged as establishing arbitrary classifications and as denying equal protection of the law to industrial combinations, the state courts, in numerous cases,[17] have sustained the legislation, predicating their decisions on the following economic facts.

> Farmers and other agricultural producers are so widely scattered and numerous that the establishment of a monopoly by them is virtually impossible; they are persons of limited means, producing by their labor perishable products for which they lack storage facilities, and which as individuals they are compelled to

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[17]*List v. Burley Tobacco Growers Co-op. Assn.*, 114 Ohio State 361, 151 N. E. 471; *Warren v. Alabama Farm Bureau Cotton Assn.*, 213 Ala. 61, 104 So. 264; *Arkansas Cotton Growers Co-Op. Assn. v. Brown*, 168 Ark. 504, 270 S. W. 946; *Manchester Dairy System v. Hayward*, 82 N. H. 193, 132 Atl. 12; *Tobacco Growers Co-Op. Assn. v. Jones*, 185 N. C. 265, 117 S. E. 174; *No. Wisconsin Co-Op. Tobacco Pool v. Bekkedal*, 182 Wisc. 571, 197 N. W. 936; *Minnesota Wheat Growers' Co-Op. M. Assn. v. Huggins*, 162 Minn. 8, 203 N. W. 420; *Dark Tobacco Growers Co-Op. Assn. v. Dunn*, 150 Tenn. 614, 266 S. W. 308; *Potter v. Dark Tobacco Growers' Co-Op. Assn.*, 201 Ky. 441, 257 S. W. 33; *Brock v. Hardie, Sheriff, et al.*, 114 Fla. 670, 154 So. 690; *United States v. Dairy Coop. Assn.*, 49 Fed. Supp. 475; *Kansas Wheat Growers v. Charlet*, 118 Kans. 765, 236 Pac. 657; *Liberty Warehouse Co. v. Burley Tobacco Growers Coop. Assn.*, 208 Ky. 643, 271 S. W. 695; *Dark Tobacco Growers v. Mason*, 150 Tenn. 228, 263 S. W. 60; *So. Carolina Cotton Growers v. English*, 135 S. C. 19, 133 S. E. 542; *Louisiana Farm Bureau v. Bacon*, 164 La. 126, 113 So. 790, approving *Louisiana Farm Bureau v. Clark*, 107 So. 115; *Kansas Wheat Growers v. Oden*, 124 Kan. 179, 257 Pac. 975; *United States v. American Livestock Comm. Co.*, 279 U. S. 435; *Kansas Wheat Growers v. Rowan*, 123 Kan. 169, 254 Pac. 326; *Lennox v. Texas Cotton*, 257 S. W. 935, 55 S. W. 2d 543; *Kansas Wheat Growers Assn. v. Schulte*, 113 Kan. 672, 216 Pac. 311; *Ex parte Baldwin County Producers Corp.*, 203 Ala. 345, 83 So. 69; *Anaheim Citrus Fruit Assn. v. Yeoman*, 51 Cal. App. 759, 197 Pac. 959; *L. & N. Railroad Co. v. Burley Tobacco Soc.*, 147 Ky. 22, 143 S. W. 1040; *Castorland Milk Co. v. Shantz*, 179 N. Y. S. 131; *California Raisin Growers v. Abbott*, 160 Cal. 601, 117 Pac. 767; *Dark Tobacco Growers v. Robertson*, 84 Ind. App. 51, 150 N. E. 106.

dispose of virtually under conditions of forced sales; their lack of bargaining power must be contrasted with the economic strength of distributors, processors and manufacturers, relatively few in number, well financed and with adequate storage facilities, investing their money for a profit in the products produced by the labor of the original producers.

At one end of the economic process stands the worker who invests his labor either as an employee or as a working producer. He does not buy in order to sell. He works in order to earn wages (*i. e.*, a direct sale of his labor) or in order to sell the product of his labor (*i.e.*, an indirect sale of his labor). His numbers are legion. At the other end of the process stands the consumer who does not buy in order to sell; he buys for the purpose of personal consumption. Every person in one aspect of his life, falls into this category.

In between are the relatively few and economically powerful, who buy and sell for profit, and who by combining can undermine the economic conditions of workers and working producers and of consumers. Only by permitting combinations of laborers and original producers to fix the prices at which they will sell their labor and their produce, and by prohibiting price-fixing combinations of middlemen can the inherent inequality in the economic strength of the various groups be reduced.

Those who basically sell their labor are not in a position to directly affect consumer prices (absent a combination with employers or middlemen); those who invest and deal in commodities are. Collective

action by farmers furthers the public good and the objectives of the Sherman Act because it actually lessens the ability of middlemen to achieve monopoly control; such combinations increase supplies, raise prices to producers and lower them for consumers. For the middleman, on the other hand, fixed prices are almost invariably accompanied by restrictions on production designed to maintain relatively high consumer demand at increased prices.

Nevertheless, in 1902 these statutes were declared void under the Fourteenth Amendment on the ground that there was no justification for the treatment of agriculture differently than trade and manufacture (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540).

Then in 1914, the Clayton Act was adopted. Its basic thesis, so far as the point under discussion is involved, was set forth in the Cummins Amendment incorporated in Section 6 of the Act: "The labor of a human being is not a commodity or article of commerce." Immediately following this statement, said Section 6 refers in a single phrase to "labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help" and treats these several kinds of organizations uniformly. Such organizations are proclaimed to be legal as are the activities of their members in carrying out their legitimate objects. The statute thus, by implication at least, writes into the law the economic truth that the farmer as a working producer is basically selling his labor, even though the return to him may assume the appearance of the price for the product of his work rather than the more apparent form of wages.

A review of the history of the legislation confirms the conclusion that the Cummins Amendment deals with fundamental economic relationships and concepts, distinguishing those situations in which an individual is in business to earn a profit on his investment from those in which his earnings accrue from the sale of his labor or the immediate product thereof (see article by Louis Boudin, 29 Virginia Law Review 395). Thus, the Senate committee in reporting the Clayton Act to the floor said:

> ". . . the only organization which should be excluded from the operation of the anti-trust laws are those where *labor is the basis or one of the chief factors* in the organizations, as in the case of labor organizations proper, and in agricultural and horticultural organizations. The Committee rests this distinction upon the broad ground that labor is not and ought not to be regarded as, a commodity, within the purview of anti-trust laws." (Emphasis supplied. S. Rep. No. 698, 63rd Cong. 2d Sess. (1914) 46; see also 51 Cong. Rec. 9546, 13979-83.)[18]

While the "legitimate objects" referred to in the statute are nowhere defined, they certainly include the securing of contracts establishing the compensation which the members of such organizations receive for their labor, whether that compensation be denominated wages or prices (*United States v. Borden,* 308 U. S. 188, 204-5).

Wage agreements between unions and employers are legitimate objects of labor organizations, even though they "may have some influence on price competition by elimi-

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[18]The court below held that Section 6 of the Clayton Act applies only to situations involving an employer-employee relationship [R. 2622-3].

nating that part of such competition which is based on differences in labor standards" (*Apex Hosiery Co. v. Leader*, 310 U. S. at 503). Their equivalents for working producers are agreements setting the prices of the products of their labor; such agreements, too, are valid even though they affect prices to the extent that they reduce that part of competition which arises from differences in prices received by original working producers.

It is only where the activity of labor is aimed at the control of prices at a level beyond the price of labor that the Sherman Act comes into play. Similarly only where the activity of original working producers is aimed at the control of prices at a level beyond the price of the original products of nature may the Sherman Act be invoked. Restraints at the level of the price of labor or of the original products of nature were not considered restraints of trade at common law and are specifically eliminated from Sherman Act coverage by paragraph 6 of the Clayton Act (*United States v. Borden*, 308 U. S. 188, 204-5; *United States v. Dairy Co-op Assn.*, 49 Fed. Supp. 475).

Such restraints must be classified as "indirect" rather than "direct" because they only indirectly affect competition and prices at those points in the economic structure falling within the compass of the Sherman Act. Such indirect restraints are outside the scope of the Sherman Act (*Apex Hosiery Co. v. Leader*, 310 U. S. at 511; *Hopkins v. United States*, 171 U. S. 578; *Anderson v. United States*, 171 U. S. 604, 615-16; *Levering & G. Co. v. Morrin*, 289 U. S. 103; *United States v. Bay Area Painters & Decorators Joint Committee*, 49 Fed. Supp. 733).

However, just as the original intent of the Sherman Act was not immediately recognized by the courts, so the pur-

poses of the Clayton Act were not forthwith fully translated into judicial decisions (*United States v. Hutcheson*, 312 U. S. 219, 230-4). Both organized labor and original producers continued their efforts to free themselves from the restrictions of the anti-trust legislation. The producers of agricultural products were the first to obtain further legislative relief. In 1922 the Capper-Volstead Act (42 Stat. 388, C. 57, pars. 1 and 2; 7 U. S. C. A. Secs. 291 and 292) became law. This legislation goes beyond the Clayton Act, in that it permits farmers and other original producers to combine not only for the purpose of fixing the price at which agricultural products will be sold, but in addition to act collectively in "processing, preparing for market and marketing" such products. It allows original producers to extend their activities into the processing level and to act collectively in this regard, and it empowers the making of "the necessary contracts and agreements to effect such purposes." Thus, the "legitimate object" of the Clayton Act permitting combinations which enhance the price of the original product was restated and extended. That such combinations are given legal sanction despite the fact that they "restrain trade" is evidenced by the procedure set up to deal with situations in which "any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural products is unduly enhanced by reason thereof." "Restraints" not having this effect are authorized.

At least in so far as the fixing of prices of the original products are concerned, it was the intent of Congress, in enacting the Capper-Volstead Act, to effectuate the original intent of the Sherman and Clayton Acts and to permit collective action by producers of agricultural products.

Thus, during the course of the Senate debate on the bill, Senator Calders said:

> "If the Sherman and Clayton Acts had been generally interpreted as their authors intended they should be, there would be no necessity for the enactment of the bill which we are now considering. The right of farmers to collectively market their products would generally have been conceded." 62 Cong. Rec. p. 2217; see also, pp. 2216, 2219-20, 2261.

In 1928, this Court had occasion to consider again a state anti-trust statute, containing an exemption for agriculture, a statute like the one which had been held unconstitutional twenty-six years earlier in the *Connolly* case. Without specifically overruling the *Connolly* case this Court recognized the economic reality (already legislatively acknowledged by the enactment of the Capper-Volstead Act and by legislation in 42 states) that original producers are in a different economic position from those who deal in their produce. (*Liberty Warehouse Co. v. Burley Tobacco Growers Co-Op Marketing Assn.*, 276 U. S. 71.) It approved the language of the state court in that case that it is in the public interest that such producers be allowed to organize and act in their own behalf because "the intermediate handler between the producer and final consumer injuriously operated upon both classes and fattened and flourished at thier expense." (276 U. S. 93.)

Moreover, the doctrine in the *Connolly* case has now been finally laid to rest in the case of *Tigner v. Texas*, 310 U. S. 141, where it was declared that those who labor with their hands and those who work the soil are "as a matter of economic fact in a different relation to the community from that occupied by industrial combinations."

In the meantime organized labor's fight continued. Finally in 1932 it secured the passage of the Norris-La Guardia Act (47 Stat. 70, 29 U. S. C. A., Secs. 105-115) which severely limited the power of federal courts to grant injunctions in labor dispute cases. While this legislation applies only where an employer-employee relationship exists, its effect on judicial interpretation of the Sherman Act has been all-embracing. This Court refused to read the Norris-La Guardia Act "in a spirit of mutilating narrowness" as affecting only labor dispute cases; it accepted the "change of policy" that induced the enactment, *i.e.*, "to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction" (*United States v. Hutcheson*, 312 U. S. 219, 234-6). As a result, this Court has now adopted the view of those who since 1890 have urged that the Sherman Act adopted the common law rules on restraint of trade and that "its purpose was to protect consumers from monopoly prices" achieved by the activities of trusts and combinations of capital engaged in suppressing competition in the market place (*Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 806). This new interpretation gives full vigor to the concept of the common law and of the Clayton Act that the prohibitions upon restraints of trade have no application to collective activities of laboring men (whether they be employees, farmers or "self-employed" fishermen) directed toward achieving an increased return for their labor—whether that return take the form of wages or of prices for the original products of nature.

The case of *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, held that fishermen classified as independ-

ent businessmen rather than as employees were not entitled to the protection of the Norris-La Guardia Act. On these considerations it was concluded that a "closed shop" contract, which conditioned the right to fish upon membership in a fishermen's association, restrained trade and that a strike to achieve such a contract could be prohibited by an injunction. The only question presented being whether the Norris-La Guardia Act prevented the issuance of an injunction, and an employer-employee relationship being a prerequisite for the application of that Act, the absence of such relationship was held determinative of the issues considered there; such absence is not decisive of the issue in this case, which, so far as Section 6 of the Clayton Act is concerned, turn upon the fact that "labor is the basis or one of the chief factors" involved rather than upon any technical considerations.

In the District Court opinion in the *Columbia River Packers* case [cited below, R. 2622-3], Judge McCulloch pointed out that "defendant's members are producers, just as cattlemen, grain growers, poultry raisers and orchardists are producers." (*Columbia River Packers Assn. v. Hinton,* 34 Fed. Supp. 970, 974.) Thus the economic relationship which it was held renders reliance upon the Norris-La Guardia Act inappropriate is the one thing which brings the case squarely within the terms of the Clayton Act as now construed. Later Judge McCulloch carried his original premise to its logical conclusion by ruling that an "agreement on an opening minimum price to be paid for fish negotiated by the Fishermen's Union"

does not violate the Sherman Act even though it is negotiated "with the packers as a group, rather than . . . with the packers individually."[19] The basis for this decision was "the recognition given by modern federal statutes and decisions to the special and peculiar marketing problem of producers, including commercial fishermen" (*United States v. Columbia River Fishermen's Protective Assn.*, No. C-16087, District Court of Oregon, June 15, 1943 (unreported)). Yet this opinion is cited by the court below as supporting its decision [R. 2622-3].[20]

For the purpose of the present case, it is not necessary to determine whether the Sherman Act as modified by Section 6 of the Clayton Act considered in the light of the Norris-La Guardia Act permits combinations of working original producers, such as the fishermen here, to enter into "closed shop" exclusive buying agreements. The answer to that question may depend upon whether an employer-employee relationship exists.[21] However, in this

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[19]In the instant case, the petitioners sought to obtain contracts with individual dealers, not with a group.

[20]The court also cited *Hawaiian Tuna Packers, Ltd. v. ILWU*, 72 Fed. Supp. 562, and *Manaka v. Monterey Sardine Industries*, 41 Fed. Supp. 531. In the former case a complaint charging a price-fixing combination between employer and employee fishermen was held to state a cause of action under the *Allen Bradley* case, the court noting that the court's position was subject to change if it should develop at the trial that all members of the union were admitted "as crewmen or fishermen rather than in their capacity as boatowners." The latter case arose out of a denial of all fishing opportunities because of a "closed shop" contract.

[21]It is submitted that even on this *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, *supra*, is not necessarily applicable because the points made and evidence offered here were neither presented nor considered in that case. There the only question before the Court revolved around the rights of independent businessmen. The fisherman as a working original producer was not discussed.

case, the question presented is whether working fishermen may collectively bargain for the price of the products which their labor has extracted from the bounties of nature. It is on this point that the Norris-La Guardia Act led to the re-interpretation of the law which is of decisive importance here. Only by turning the clock back may it now be held that combinations of workers to increase the return which results from their own labor, rather than from capital investment, are condemned by the Sherman Act. And this is so, regardless of the existence of an employer-employee status.

The relevant legislative developments do not stop with the Norris-La Guardia Act. In 1934, the Fishermen's Marketing Act (48 Stat. 1213-14, 15 U. S. C. A., Secs. 521-2) became law. It is based upon the Capper-Volstead Act, and its purpose and effect are to apply the provisions of said Capper-Volstead Act to fishermen (H. Rep. No. 1504 (1934)). It authorizes associations of fishermen to engage "in collectively catching, producing, preparing for market, processing, handling and marketing." Its terms are otherwise identical with the Capper-Volstead Act.

In adopting the Fishermen's Marketing Act, Congress noted the similarity between the problems, economic status and lack of bargaining power of farmers and fishermen; it recognized that the existing unstable price levels result in jeopardizing the very livelihood of the fishermen, and reduce production while maintaining consumer prices at a relatively high level. It is for these reasons that combinations to fix prices of fish at the level of its procurement from nature are not only tolerated but are actually encouraged (H. Rep. No. 1504 (1934); 62 Cong. Rec. pp. 2219-20 (1922)). Thus, the common law principles relating to original working producers, clarified by the

Clayton Act, given vitality by the Norris-La Guardia Act, and adapted specifically to agricultural producers by the Capper-Volstead Act are now categorically applied to fishermen.

In the face of all this, petitioners stand convicted on a charge of violating the Sherman Anti-Trust Law, because they sought to obtain an agreement which to some extent would stabilize the price that the working fishermen belonging to the Local receive for the fish they catch.

True, the court below stated that, in view of the activities of petitioners directed at securing the agreement, it was not necessary to decide whether the agreement standing alone would have violated the law [R. 2593].[22] A few sentences later, however, the court states: "But the gist of the accusation is the allegation of a conspiracy to fix arbitrary, artificial and non-competitive prices for all fish so caught and sold by any fishermen to any dealer" [R. 2594].[23] If the gist of the charges is the "conspiracy" with respect to prices, and petitioners submit that it is, then the case turns upon the validity of the contracts which the dealers refused to execute. If economic reality is to be recognized, if the language of legislation is to be given its plain meaning, if legislative history and intent is to be respected and if the most recent judicial opinions are to be followed, the proposed contracts must be held not to transgress upon the prohibitions of the Sherman Act.

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[22]As will be argued below, if the agreement itself is lawful, under the Sherman Act, any interference with production and transportation resulting from the attempt to achieve it does not fall within the purview of the Sherman Act.

[23]Here the language is inaccurate. The agreement sought to be executed would have applied to members of the Local and it placed no restraints upon fishing by other fishermen nor did it purport to establish prices for them [R. 14-20].

The trial court erred with respect to the instructions it gave and those it refused to give on this subject, and, therefore, the decision below should be reversed.

B. Moreover, the Fishermen's Marketing Act Standing Alone Supports the Validity of the Proposed Contracts.

The trial court refused to instruct the jury that an association of working fishermen may qualify under the Act even though it does not collectively catch, produce, prepare for market, process or handle its members' products; that such an association may engage solely in collective marketing; and that it may do so by bargaining collectively for the price at which the association's members sell directly to dealers [R. 1853-58, 1939-42; Defts. Proposed Instruction No. 12, R. 47; Nos. 5-12-13, R. 59-60].[24]

The language of the Act is permissive. There is no indication that in order to engage in any one of the permitted activities, the fishermen must engage in more than one or in all of them. In the debate on the Capper-Volstead Act, which permits similar collective action in the field of agriculture, Senator Walsh observed that the Act allowed farmers' organizations to engage in marketing *or* in processing, or both (62 Cong. Rec. p. 2156).

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[24]The court below states that "It is distinctly denied also [in the indictment] that the union was acting as a cooperative bargaining agent for the fishermen with the dealers" [R. 2597]. No such denial is to be found in the indictment. What is denied is that the members of the Local act together "in catching, producing, preparing for marketing, processing and handling their catch" [R. 7]. The Fishermen's Marketing Act permits fishermen to act together in "marketing" their products as well as in doing the things set forth above. The sufficiency of the indictment itself might well be challenged on this ground. But that is not essential here. For the record is clear. It establishes that the Local was acting as a bargaining agent for its members.

To hold otherwise in construing the Fishermen's Marketing Act would lead to the ridiculous conclusion that the more complete the economic power and scope achieved by a fishermen's association, the greater is its invulnerability to the proscriptions of the Sherman Act (*cf. Appalachian Coals Inc. v. United States,* 288 U. S. 344, 376-7).

So, too, with respect to the question whether collective bargaining may be considered as one form of collective marketing. The former is obviously the most elementary form of the latter. Congress was not concerned with the form that this collective action took; it was seeking merely to strengthen the economic position of the fishermen vis-a-vis the middlemen; for that reason it used broad terms and did not spell out precisely the form of organization or of activity permitted (H. Rep. No. 1504 (1934); T. N. E. C. Reports, p. 453, Feb. 25, 1941). The courts have long recognized that the Sherman Act as well as state anti-trust laws are not concerned with the form of combinations but rather with their purpose and effect (*Appalachian Coals Inc. v. United States, supra,* at 376-7; *Johnson v. Georgia-Carolina Retail Milk Producers Assn.,* 182 Ga. 659, 186 S. E. 824; *Stark County Milk Producers Assn. v. Tabeling,* 129 Ohio State 159, 194 N. E. 16).

During the course of the debate on the Capper-Volstead Act, Senator Calder said:

> *"They [farmers] are only asking that by affirmative action Congress recognize the principle of collective bargaining.*
>
> *"Farmers have the natural and inherent right to approach their customers through agencies of their own creation. This right should be clearly and positively recognized by Congress."* (62 Cong. Rec. p. 2217.)

In the same debate Senator Cummins noted that he favored the law because it permitted "combinations that have for their specific purpose the increase in market value" (62 Cong. Rec. p. 2264). Accordingly, farmers' marketing organizations commonly participate in bargaining functions only, and this has never been construed to be outside the protective cloak of the Capper-Volstead Act. (Note, for example, the Milk Producers' Bargaining Agency referred to in *United States v. Rock Royal Cooperative,* 307 U. S. 533, 541, 26 Fed. Supp. 534, 540; see also *Johnson v. Georgia-Carolina Milk Producers Assn., supra; Stark v. Georgia-Carolina Milk Producers Assn. v. Tabeling, supra;* Evans, Frank and Stodyk, E. A., "The Law of Cooperative Marketing," Lawyers Coop. Pub. Co. N. Y., 1937, p. 163; Hulbert, L. S., "Legal Phases of Cooperative Associations", Farm Credit Administration, U. S. Dept. of Agriculture, Wash., D. C., 1942, p. 119).

That collective "bargaining for the sale of fishing products of producers to manufacturers, etc." is permitted by the Fishermen's Marketing Act is the position of the governmental agency charged with its enforcement ("Organizing and Incorporating Fishing Cooperative Marketing Association," Fisheries Circular 22, Bureau of Fisheries, United States Department of Commerce (1936), pp. 2-3, 7; "Organizing and Incorporating Fishing Cooperative Marketing Associations," Fishery Leaflet 277, Fish and Wildlife Service, United States Department of Interior (1948), pp. 5-6, 13, 15[25]). As a matter of fact, bargaining "to determine the price to be paid for their products for the season or other periods of time" has been

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[25]Jurisdiction over fishery matters has been transferred from the Department of Commerce to the Department of Interior.

the charactertistic "form" of "cooperative action by fishermen in the United States" (Fishing Circular No. 22, *supra*, p. 2; Fishery Leaflet 277, *supra*, p. 5; see also "The Law of Cooperative Marketing," *supra*, p. 163).

So, as the petitioners sought to show in the court below, that is the established form of collective action by fishermen in the West Coast fishing industry. Thus in *United States v. Columbia River Fishermen's Assn., supra*, in dismissing an indictment charging price-fixing as a violation of the Sherman Act, Judge McCulloch referred to the negotiation by the fishermen's union with packers as a group of agreements "on an opening minimum price to be paid for fish" as a "practice of group bargaining which has been so satisfactory on the Columbia River" (*cf. Columbia River Packers Assn. v. Hinton, supra*, at 34 Fed. Supp. 973, wherein it was noted that the buyers of fish, who balked at the exclusive buying clause declared invalid in that case, offered to negotiate with the union "in accordance with past practice, for a price to be paid on the season's catch").

The court below, however, states: "The decisions show that farmers cannot fix prices in the manner which was attempted here . . .", citing authorities which, however, do not support that proposition [R. 2619]. Thus in *United States v. Borden Co.*, 308 U. S. 188, so cited, there was a charge against a vertical combination among producers and distributors engaged in fixing prices and controlling the supply of milk at all levels to and including the ultimate consumer. In addition, the indictment charged

a conspiracy by *distributors* and others to fix the price to be paid, regardless of membership or non-membership in a producers' or distributors' association, to *all* producers by *all* distributors. In other words, *some distributors* combined with *some* producers to set a *general market price* payable by *all* distributors to *all* producers. And, most important, this was part of a plan which culminated in the fixing of consumer prices. In the instant case the Local, through its proposed contract, sought nothing more than the establishment of prices to be paid by contracting dealers to the Local's own members. There is no evidence of any proposal to fix a general market price payable by all dealers to all fishermen. It was because the cited case did not involve, as this case does, simply "a collective association of producers to market their products," but because it was "a combined attempt of all the defendants, producers, distributors and their allies to control the market" that the Court found "no justification in Section 1 of the Capper-Volstead Act" (308 U. S. 205).[26]

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[26]The other cases cited by the court below on this point are *United States v. Universal Milk Bottle Service,* 85 Fed. Supp. 622, involving a vertical combination similar to that in the *Borden* case; *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, hardly authoritative today (*United States v. Hutcheson,* 312 U. S. 219, 236); and *Swift & Co. v. United States,* 196 U. S. 375, *United States v. King,* 250 Fed. 908, and *Mid-West Theatres Co. v. Cooperative Theatres of Michigan, Inc.,* 43 Fed. Supp. 216, in none of which the defendants were original producers or employees. Throughout the decision below, cases of this kind are relied on, *i.e.,* (1) proceedings against others than original producers or employees: *United States v. St. Joseph Stock Yards Co.,* 44 Fed. Supp. 31 [R. 2596]; *United States v. Frankfort Distilleries, Inc.,* 324 U. S.

It is respectfully submitted that the court below fell into basic error by confusing combinations of fishermen having as their objective the obtaining of contracts, setting the prices at which their individual members will sell the products of their own work, with other types of combinations having other kinds of objectives. At the very least, the petitioners were entitled to have their theory of the case properly submitted to the jury. The court's refusal to instruct the jury that under the Fishermen's Marketing Act fishermen may associate together for the purpose of obtaining collective bargaining agreements establishing the price at which individual members will sell their catch constitutes reversible error.

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293 [R. 2596]; *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219 [R. 2597]; *United States v. Yellow Cab Co.*, 332 U. S. 218 [R. 2600]; *Indiana Farmer's Guide Pub. Co. v. Prairie*, 293 U. S. 268 [R. 2600]; *Montague & Co. v. Lowry*, 193 U. S. 38; *United States v. Women's Sportswear Mfgrs. Assn.*, 336 U. S. 460 [R. 2601]; *Associated Press v. United States*, 326 U. S. 1 [R. 2612]; *Eastern States Retail Lumber Dealers Assn. v. United States*, 234 U. S. 600 [R. 2618]; *United States v. Masonite Corp.*, 316 U. S. 265 [R. 2627]; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 [R. 2627]; *United States v. Trenton Potteries*, 273 U. S. 392 [R. 2627]; (2) cases of vertical conspiracies: *United States v. Brims*, 272 U. S. 549 [R. 2598]; *United Brotherhood v. United States*, 330 U. S. 395 [R. 2598]; (3) other cases: *Steers v. United States*, 192 Fed. 1 (1911) [R. 2600]; a conspiracy of tobacco growers to physically prevent shipments of tobacco relying upon *Loewe v. Lawlor, supra*, among other cases, decided before the Clayton Act, etc., and certainly entitled to no weight since the *Apex, Allen Bradley* and *Hutcheson* cases; *Anderson v. Shipowners Assn.*, 272 U. S. 359 [R. 2612], holding that a contract regulating employment violates the Sherman Act, based on the *Duplex* and other cases which no longer state the law.

II.

Evidence of Economic Conditions of Working Fishermen, of the Effect of Collective Bargaining Agreements on Production and on Consumer Prices and Similar Economic Facts Were Relevant on the Issue of the Validity of the Proposed Contracts, and Such Evidence Should Have Been Admitted and Considered by the Jury Under Appropriate Instructions.

The court below agreed with the trial court that the proposed contracts which petitioners sought to have the dealers execute were illegal *per se* and that evidence relating to the economic conditions of working fishermen and to the effect of the proposed contracts on production and on consumer prices was irrelevant. (See Statement of Matter Involved," "The Trial," *ante.*) In support of its position the appellate court cited: *United States v. Trenton Potteries Company,* 273 U. S. 392, 396; *United States v. Masonite Corporation,* 316 U. S. 265, 274; *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150, 222; and *Ethyl Gasoline Corporation v. United States,* 309 U. S. 436, 458 [R. 2627].

The principles enunciated in these decisions, dealing with price-fixing combinations by great aggregations of industrial capital having the potential power to increase consumer prices and thereby affect the public interest, were mechanically transferred to working original producers. Congress, however, has not treated industrial concerns in the same manner as it has associations of original producers. To the contrary, the legislative history discussed above (Point I) establishes that Congress has considered original working producers as more closely related to workers employed by industry than to the owners of that

industry. Assuming arguendo that the Sherman Act as modified by the Clayton Act, the Norris-La Guardia Act, the Capper-Volstead Act and the Fishermen's Marketing Act does not directly permit agreements fixing prices to be paid to working fishermen, at the very least this legislation, considered in its entirety, precludes the automatic application to working producers of tenets developed with respect to combinations of processors, manufacturers and distributors.

The road leading to the present construction of the Sherman Act has been long and tortuous. But some things are now clear. It is now recognized that the purpose of the Sherman Act "was to protect consumers from monopoly prices" and from those restraints of trade which create the power to loot the pockets of the consumer (*Allen Bradley Co. v. Local Union No. 3,* 325 U. S. 797, 806; *cf. Dr. Miles Co. v. John D. Park & Sons Co.,* 220 U. S. 373; *Board of Trade v. United States,* 246 U. S. 231, 240). It is now established that those who work the soil and the sea occupy a different economic position than do traders and industrialists (*Tigner v. Texas,* 310 U. S. 141).

And it is not without significance that on the very day that the *Tigner* case was decided, the *per se* rule applicable to price control by large aggregations of capital was clarified and strengthened in *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150. For in the former case this Court stated that, as applied to agriculure, the economic dissimilarity between those who toil to bring forth the products of nature and those who invest in those products results in "a conception of price and production policy for agriculture very different from that which un-

derlies the demands made upon industry and commerce by anti-trust laws" (*Tigner v. Texas, supra,* at 310 U. S. 146).

Yet the court below refused to allow the petitioners to prove that as workers expending their own energy in extracting the yields of the sea, their economic position was the same as that of the farmer and different from that of the industrialist.

In the *Apex Hosiery Co.* case, 310 U. S. at 512-13, the Court refused to apply to organized labor stricter limitations than those which the Court had imposed upon the coal industry in *Appalachian Coals v. United States,* 288 U. S. 344. But the petitioners here were not afforded a similar equality. In the *Appalachian Coals* case, this Court held that there was no violation of the Sherman Act by a combination of coal producers which fixed prices for coal sold directly by the combination or by the individual members thereof acting through sub-agents.[27] For, the Court ruled, the purpose of the plan was to aid the industry to recover from a serious economic plight and the combination would not "be able to fix the price of coal in the consuming markets" (288 U. S. 358 and 372-3; *cf. Standard Oil v. United States,* 283 U. S. 163). There, economic facts were decisive; here they were given no consideration.

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[27]Only the latter method of setting prices was contemplated by the combination in the instant case.

The percentage of producers combined is smaller in this case than it was in the cited case. There the combination had the power to stabilize and raise prices, without, however, being able to prevent substantial active competition; here consumer prices cannot be raised at all, and at the point of sale to the dealers the volume of competing fish and other proteins is so great as to render the fish caught by members of the Local an insignificant factor in the determination of the market price.[28] In the cited case, there was no effort to limit production; where contract prices for fishermen have been established, great increases in production have followed.

In the *Appalachian Coal* case, some of the coal produced exceeded immediate demand and had to be sold at "distress" prices; here the catch of fish is concentrated in a short period, almost always exceeds immediate demand and as a general rule is sold under "distress" conditions. In both cases, the producers were faced with "a buyer's

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[28]The opinion of the court below quotes from the *Appalachian Coals* case, *supra*: "The plan cannot be said either to contemplate or to involve the fixing of market prices" (288 U. S. 373) [R. 2610]. Aside from the fact that the opinion refers to market and consumer prices interchangeably (the lack of effect on *consumer* prices being a basis of distinction of the *Socony-Vacuum* case, 310 U. S. at 215-16), it is clear that this Court meant that because the coal sold by the combination had to compete with other coal, there would be no fixing of a general market price, as distinguished from a contract price. (See particularly discussion of *Trenton Potteries* case, 288 U. S. at 375; *cf. Standard Oil Co. v. United States,* 283 U. S. 163; *Board of Trade v. United States,* 246 U. S. 231.) Here, offers to prove an identical state of facts were rejected.

market;" in neither case were the producers in a position to hold their products for a favorable market. In addition, state regulation of the fishing industry complicate and aggravate the economic problems of the fishermen (*Cf. United States v. Rock Royal Co-Operative*, 307 U. S. 533, 549-50).

In the cited case, stress is placed on the unprofitable condition of the coal industry. At a time when throughout the country there was a seller's market and the economy was threatened not by low prices but by over ceiling prices on both the commodity and labor markets, the fishermen found it necessary to combine in order to try to increase their prices to the O.P.A. maximum. This demonstrates the relative weakness of these fishermen as compared with other groups in our economy.

Moreover, in the *Appalachian Coal* case, the combination involved consisted of producers who invested their capital for a profit; in this case it is made up of original producers who invest their labor for a living. The Sherman Act is concerned with economic problems. Therefore the position of petitioners as workers is of critical importance, regardless of technical relationships. This Court, and others, in interpreting and applying statutes regulating economic subjects have looked below the surface of technical relationships to "underlying economic realities" (*N. L. R. B. v. Hearst*, 322 U. S. 111, 127-8; *N. L. R. B. v. E. C. Atkins & Co.*, 331 U. S. 398, 403; *N. L. R. B. v. Blount*, 131 F. 2d 585, cert. den. 318 U. S. 791; *Rutherford Food Corp. v. McComb*, 331 U. S. 722; *People v.*

Gasman, 295 N. Y. 254, 66 N. E. 2d 705; *Singer v. Kirsch Beverages*, 271 App. Div. 801, 65 N. Y. S. 2d 400.

Nor does the fact that some of the petitioners owned boats change the character of their economic status. It has been recognized that to a working small boat fisherman, his boat constitutes the "tool" of his trade. "Strictly speaking, the fishermen represent venture labor rather than venture capital" (*In the Matter of Alaska Salmon Industry Inc.*, 27 War Lab. Rep. 760; *Cf. United States v. Peterson*, 28 F. 2d 29, 30; *United States v. Laflin*, 24 F. 2d 683).

It is not necessary to speculate concerning the outcome of the case if the petitioners had been allowed to present their proffered evidence and the jury had been properly instructed on the law with respect to such evidence. It was petitioners' defense that they were laboring men; that they were not engaged in business for a profit; that a combination by them to contract for the prices at which they individually sold the produce of their labor could lead to none of the economic evils at which the Sherman Act is aimed; that the combination was designed to equalize the bargaining power between the dealers and the fishermen, to increase production and to thereby reduce consumer prices—all desirable objectives under the existing national policies as expressed in the anti-trust laws and elsewhere. Unless the labor of a human being is still a commodity within the meaning of the Sherman Act, the petitioners had the right to present this defense. The refusal to permit this is reversible error.

III.

If, as Petitioners Contend, Since the Proposed Contract Did Not Violate the Sherman Act, the "Strike" and the Activities Pursuant Thereto Designed to Secure Said Contract Were Not Restraints of Trade Within the Purview of the Sherman Act.

The jury was instructed that even if the proposed contract was otherwise valid, the use of "practices and tactics" other than "free and voluntary negotiations" in order "to force any buyer of fish to enter into such a contract" would render the combination illegal under the Sherman Act. The petitioners' position was that evidence of strike activities might be admitted solely to prove the plan to secure the proposed contract; and that if the proposed contract itself did not infringe upon the Sherman Act, then the evidence of strike activities established no violation thereof.[29]

By the trial court's instructions the law of duress in commercial contracts is imported into the Sherman Act; a contract otherwise valid is invalidated under that Act if it is obtained by means of picketing. Every contract affecting interstate commerce procured by any means which vitiates consent becomes a criminal violation of the Sherman Act.

Petitioners submit that it is not coercive methods that are condemned by the Sherman Act. Even if an agree-

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[29]The court below stated that the validity of the proposed contract, if voluntarily negotiated, need not be determined in this case because the strike activities to secure the agreement, in any event, constituted an illegal restraint of commerce [R. 2595]. It was on this basis that the court distinguished Judge McCulloch's decision in *United States v. Columbia River Fishermen's Protective Assn., supra* (No. C-16087, D. C. Ore., unreported) [R. 2608].

ment were obtained at the point of a gun, its validity *under the anti-trust laws* would depend solely upon whether the terms of agreement illegally restrained commerce. And if the agreement did so restrain commerce, the violation of the anti-trust laws would be no less if all the parties to the agreement had entered into it without the slightest semblance of pressure from anyone (*Apex Hosiery Co. v. Leader*, 310 U. S. 469, and *United States v. Hutcheson*, 312 U. S. 219; *Cf. United States v. Rock Royal Co-operative*, 307 U. S. 533, 557-60).

In economic transactions generally, parties use their economic power to obtain the best possible terms. A trade union uses such power when it strikes. An agreement reached in settlement of a strike is not illegal under the anti-trust laws by reason of the fact that it may have resulted from acts of coercion, lawful or unlawful, which acts of coercion actually interfered with the free flow of goods in interstate commerce. In fact the court below reluctantly conceded that this Court has ruled that coercive tactics by labor unions which interfere with shipment or delivery of goods in interstate commerce are not prohibited by the Sherman Act [R. 2619-24]. However, the appellate court relied largely on a footnote in *Allen Bradley Co. v. Local Union No. 3*, I. B. E. W., 325 U. S. 797, wherein the above principle was enunciated, which footnote distinguished *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, on the grounds that there no labor dispute was involved and no employer-employee relationship existed (Footnote 12, 325 U. S. 807). From this, the court below concluded that although interferences with interstate transportation by labor unions may not be forbidden by the Sherman Act, such obstructions by others, such as petitioners here, are prohibited [R. 2611].

What was overlooked, however, was that in the *Columbia River Packers* case, it was the objective of an exclusive buying, "closed shop" arrangement which was declared illegal, not the means used to achieve it. Furthermore, both the *Allen Bradley* and *Columbia River Packers* cases related to actions for injunctive relief, and they both turned on whether or not a labor dispute was involved. But the question here is not whether the courts may or may not grant injunctive relief depending upon the existence of a labor dispute. Rather the issue to be determined is whether the Sherman Act is directed against interruptions of interstate production, shipments and transportation of the kind normally resultant from a strike, where the objective of such activities does not violate the Sherman Act.

The court below dealt with petitioners' contentions as though they were identical with those that organized labor urged unsuccessfully for many years. For decades labor unions argued in vain that they were completely exempted from the operation of the Sherman Act. But the Act was consistently applied to unions, beginning almost immediately after the original passage of the law in 1890 (*United States v. Workingmen's Amalgamated Council*, 54 Fed. 994 and *United States v. Debs*, 64 Fed. 724); again in 1907 when a group of workers lost their homes and savings through the decision in the *Danbury Hatters* case (*Loewe v. Lawlor*, 208 U. S. 274), and again in 1921 and 1926 when the fruits of the legislative victory believed by labor unions to have been achieved through passage of the Clayton Act were denied them in *Duplex v. Deering*, 254 U. S. 443, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, 274 U. S. 37, over the dissents of Justices Holmes and Brandeis.

In fact, labor's great court victory came only in 1940 when Chief Justice Stone in the case of *Apex Hosiery Co. v. Leader, supra,* 310 U. S. 469, expressly disregarded labor's arguments that the Sherman Act did not apply to it, and then proceeded to point out for the first time the obvious truth that had escaped all of the earlier litigants, to-wit: that interference with production, shipment and transportation, not part of a plan to achieve an economic objective forbidden by the Sherman Act is simply not the evil at which the Act is directed. As far as labor unions are concerned, raising of wages is not such a forbidden economic objective. Therefore, strikes to achieve wage increases are not within the ambit of the Sherman Act, even though the strike activities actually obstruct the production and movement of goods in interstate commerce.

The Sherman Act "does not condemn all combinations and conspiracies which interrupt interstate transportation." Particularly the Act "was not aimed at policing interstate transportation or movements of goods and property." Whether it may be invoked depends "upon the nature of the restraint and its effect on commerce." The Act was aimed at "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services." In other words, this Act does not have as its purpose the physical maintenance of a continuous flow of commerce, free from *any* interruptions. It is concerned with economic problems—with limitations on competition and with fixing of prices contrary to public welfare. (*Apex Hosiery Co. v. Leader, supra,* at 310 U. S. 485-7, 490, 493, 496, 512-13.)

These principles enunciated in the *Apex* case are not limited to the activities of labor unions; they apply to "industry and labor alike." Strikes which have prevented shipment of goods in interstate commerce have been held outside the scope of the Sherman Act, not because labor unions were involved but because the strikes did not affect prices other than the price of labor and they did not "restrain commercial competition in some substantial way" (*Apex Hosiery Co. v. Leader, supra*).

Ordinarily an agreement or combination controlling prices is precisely the type of restraint forbidden by the Act; an agreement or combination setting wages is not. A price agreement on behalf of or by a combination of working original producers, especially fishermen, falls within the same category as a wage agreement. It is not condemned by the Sherman Act, at least as modified by subsequent legislation (see Points I and II above).

Where there is an interruption of commerce as a result of a conspiracy to fix prices in ordinary commercial transactions, there is a violation of the Sherman Act, not because of the interruption of commerce, but because of the price-fixing combination. Where price-fixing or wage-fixing agreements are allowed by law, interruptions of commerce as a result of the effort to secure such agreements are outside the area with which the Sherman Act is concerned. In neither labor nor non-labor cases has this Court ever applied the Sherman Act in any other way (*Apex Hosiery Co. v. Leader,* 310 U. S. at 495-6).

It is the intent to affect prices at the level at which the Sherman Act is operative (*i. e.,* excluding at least combinations to fix the price of labor or the price of the orig-

inal products of the land and the sea) which is the indispensable element in a charge of price-fixing in violation of that law. This rule has not developed out of labor cases; it has developed out of non-labor cases, like *Appalachian Coals, supra,* and has been applied in labor cases (*Apex Hosiery Co. v. Leader, supra,* at 310 U. S. 503). Conspiracies and combinations which interfere with the free *flow* of commerce are indirect obstructions not within the Sherman Act unless it is shown that they are "aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy" (*Apex Hosiery* case, *supra,* at 511).

Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295, 310, and *United Leather Workers v. Herkert & M. Trunk Co.,* 265 U. S. 457, are cited by the court below for the proposition that "the fixing of prices always has a direct effect upon commerce" [R. 2627]. In those cases it was held that while combinations of employees for the purpose of fixing the price of their labor restrains commerce only indirectly, such combinations to fix the price of the product on the market are direct restraints. Thus, in the *Coronado Coal* case, the Court said that "the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production" is an indirect and remote obstruction of commerce where its purpose is to control wages, but it becomes a direct and forbidden obstruction where its purpose is to affect the market price of the commodity (268 U. S. 310).

Here, too, the legality under the Sherman Act of petitioners' activities turns on the validity of the proposed contract which was the subject of the strike. The fixing of prices at the producers' level by fishermen, like the fixing of wages by employees, is not forbidden by the Sherman Act; therefore, the strike activities to achieve a contract fixing such prices are not illegal. In order to bring this case within the outlawed area, it would be necessary to show that petitioners' purpose or the effect of their acts was to fix prices at a level beyond that of the sale from the original producer to the middleman (*United States v. Borden,* 308 U. S. 188).

The effect of the *Apex Hosiery Co.* case on this issue was well stated in the dissenting opinion of Mr. Chief Justice Hughes:

> ". . . it seems to be definitely determined that a conspiracy of workers, *or for that matter of others,* to obstruct or prevent the shipment or delivery of goods in interstate commerce to fill the orders of the customers of a manufacturer or dealer is not a violation of the Sherman Act." (Emphasis supplied.)
>
> 310 U. S. 514-515.

The purport of the decision below is to equate an "involuntary" agreement with price fixing which runs counter to the economic objectives of the Sherman Act. It extends the force of the Act as a means for policing interstate operations instead of limiting its use to the prevention of the economic evils it was designed to attack. The court's instructions on this point were prejudicially erroneous and the decision below should, therefore, be reversed.

IV.

The Selection of a Substantial Percentage of Those Listed for Possible Jury Service From Society Registers and Clubs and of Most of the Balance From the Telephone Directory, Together With the Use of Lists of Names Thus Selected Accumulated Over a Period of Over Twenty Years in a Community in Which the Economic Composition of the Population Has Radically Changed Does Not Comport With the Concept That a Jury Should Be a Representative Body Drawn From a Cross-section of the Community, Particularly Where the Method of Selection Results in a Consistent and Extreme Overrepresentation of Persons in the Higher, and Underrepresentation of Those in the Lower, Economic Classifications.

The requirement for a fair and impartial jury that its individual members should have no personal bias or interest with respect to the case in which they are sitting is not the only standard which must be met. The jury is an instrumentality and representative of the community from which it is drawn. On many subjects the norms which find acceptance among the various groups in the community differ greatly. The verdict of a jury may be largely determined by the social, political and economic viewpoints of its members, even though each of them is personally unbiased. Such viewpoints generally reflect the sum total of the individual's background and experience. Thus, workers as a group have a somewhat different attitude toward the size of corporate profits than do those whose income is derived largely from stock dividends. So, too, the attitude of these two groups on wages, unions, anti-trust laws and a multitude of other questions tends to be divergent [R. 2420-1]. As long as thirty

years ago, one United States District Court judge differentiated between the attitudes of city people who "do business in a large way" and those of country people who "do business on a smaller scale" (*United States v. Standard Oil Co.*, 170 Fed. 988, 994).

In order to be truly fair and impartial, a jury must reflect as accurately as is practical the various viewpoints prevalent in the community. But juries not being elected bodies, the problem is how this objective can best be approached.[30] The answer to this problem is now ingrained in the federal jury system. A jury to be fair and impartial must be "truly representative of the community"; to be so representative it must be drawn from a "cross-section of the community." A jury so drawn will tend to include workers and employers, Negroes and whites and members of all groups in the community, generally, and on an overall basis, in approximate proportion to their numbers in the community. This in turn will tend to give juries that diversity of viewpoint which is representative of the community and which is essential for fairness and impartiality (*Smith v. Texas*, 311 U. S. 128; *Glasser v. United States*, 315 U. S. 60, 86; *Thiel v. Southern Pacific Co.*, 328 U. S. 217; *Ballard v. United States*, 329 U. S. 187).

The petitioners challenged the jury panels in this case on the ground that they were selected by a system not consonant with these principles, a system the use of which

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[30]The opinion of the court below is predicated upon the proposition that full and equal justice can be rendered in any kind of a case without regard to the economic background of the jurors, *i. e.*, whether they all be "habitues of the park benches" or "socialites and blue-stockings" [R. 2634-5].

necessarily discriminated in favor of businessmen and those in the higher economic brackets and against workers and those in the lower economic groups. This challenge was condemned by the court below with wrathful indignation as "an attack on democracy itself", as an attempt "to overthrow the jury system by the injection of the concepts of class conflict" and thereby "to bring the administration of the law into disrepute"[31] [R. 2634-5].

Rather than attempting to overthrow the jury system by the "injection of concepts of class conflict", petitioners seek to maintain the jury as a "body truly representative of the community"—as this Court has said is required for "the proper functioning of the jury system, and, indeed, our democracy itself". It is this Court which has said that a jury must not be "the organ of any special group or class". It is this Court which has held that the ideal of the jury as a representative cross-section of the community "developed in harmony with our basic concepts of a democratic society and a representative govern-

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[31]In fact the attorneys for the petitioners were stated by the appellate court to have obstructed justice because they urged the jury challenge "with tremendous force upon the trial judge and with earnestness and circumstantiality" and were accordingly censured [R. 2635]. This, despite the fact that no question of misconduct on the part of counsel had been raised in either the trial or appellate courts, and the trial court had highly praised said counsel for their "magnificent" handling of the matter [R. 2525, 2645-50] (on petition for rehearing the court below was asked to consider certain typewritten portions of the record in which the trial court commented on the handling of the challenge. This it refused to do. However, on the 14th day of December, 1949, the appellate court issued an order *nunc pro tunc* as of November 29, 1949, adding said typewritten portions of the transcript to the record on appeal [R. 2643-5]).

ment" (*Glasser v. United States*, 315 U. S. at 85-86). It is the upholding of discrimination against "those of low economic and social status" which attacks democracy because it breathes "life into any latent tendencies to establish the jury as an instrument of the economic and socially privileged". It is the *failure* to select a jury in a manner calculated to result in a representative body that runs counter to the democratic notion that "those eligible for jury service are to be found in every stratum of society"; it is such failure that opens "the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury" (*Thiel v. Southern Pacific Co.*, 328 U. S. at 220, 223-4).

It has been said that discrimination will be disregarded unless it is "intentional and systematic". But this does not refer to motive. Rather it is a recognition of the fact that no jury can constitute a perfect cross-section of the community. Therefore, in every instance some "discrimination" is inevitable. But it is not this inevitable "discrimination" resulting from *chance* alone which is to be stricken down, for that, indeed, would be tantamount to the destruction of the jury system itself. What is forbidden, regardless of motivation, is the discrimination which does not result from chance but which is inherent in the procedure intentionally used. It is incumbent upon the courts to devise and utilize a "process which will insure a trial by a representative group" (*Glasser v. United States*, 315 U. S. at 86), and whereby "unlawful distinctions and discriminations are . . . avoided" (*Thiel v. Southern Pacific Co.*, 328 U. S. at 220).

The vice of the method of selection here involved is that it is inherently discriminatory. The quality of the

discrimination here is like that in the *Thiel* case where there was preference for "business executives or those having the employer's viewpoint . . . thus giving majority representation to one class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes" (328 U. S. 219-20).

Instead of condemning such a process as undemocratic, the court below turned its fire on those who resisted it. But even the court below recognized that the jury commissioner "at least in the letter violated" some of "the principles laid down by the Supreme Court of the United States [in the *Glasser* case] with regard to jury selection". The use of names from such sources as the various social clubs and the social register, the court below states, is "surprising after the years which have passed" since such use was held improper[32] [R. 2635-6]. Thus, there is in this case, not only the use of procedure undermining the general principle that a jury must be representative and not "the organ of a special class", but the pursuit of the *specific practice* of "the deliberate selection of jurors from the membership of particular private organizations" which has been unequivocally forbidden as not in conformity with "the traditional requirements of a jury trial" (*Glasser v. United States*, 315 U. S. at 86).

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[32]However, these "deviations" were disregarded as "comparatively minor" [R. 2636].

The use of the Society Blue Book is certainly no less to be condemned than the selection of names from the rosters of private organizations, composed of persons in the higher economic brackets. Both must be disapproved because they are inconsistent with the concept of a jury chosen from a cross-section of the community. The entire method of jury selection used here is at war with this principle.

The issue on this point does not turn upon the propriety of the utilization of the telephone directory as a source for the majority of the names used. If names thus obtained had been supplemented by others from sources in which those in the lowest economic categories had been well represented, the procedure might have passed muster. But here an exactly opposite course was followed. The unrepresentative characteristics of the telephone directory were multiplied and intensified. One-fourth of the new names drawn were obtained from a tiny segment of the population specially selected because of their upper bracket and socialite status. It matters not that the jury commissioner did not aim at this result; by intentionally using the Blue Book and its select names, he accomplished it.

To this is added the use of lists accumulated over a period of twenty years, these lists themselves originally prepared from substantially the same sources or their equivalents. Then it is necessary to stand back and look at the entire process and answer the question: Is the method used one reasonably calculated to result in a repre-

sentative jury selected from a cross-section of the community?

It is respectfully submitted that only a negative answer is possible. However, petitioners have not relied solely on this showing of the methods used. Through expert testimony analyzing the methods used and the results thereof, it has been established, first, that the methods used are such that a cross-section of the community could not conceivably have been obtained and a representative jury was an impossibility; and, second, that the results are consistently so unrepresentative of the community that they could flow only from a method inherently discriminatory. Thus, petitioners have predicated their case on this issue both on the approach of the *Glasser, Thiel* and *Ballard* cases, *supra,* where the evidence of the departure from the requirements of law is found in the methods used and on that in *Smith v. Texas, supra,* where the results of the system were held to establish its invalidity.

For, as is said in the *Smith* case, where "chance and accident alone" cannot account for the extreme and continuous deviations from a jury representative of the community "discrimination" is shown. And it matters not whether the "discrimination" has been "accomplished ingeniously or ingenuously"; an end must be put to it (311 U. S. 131-2).

This can and should be done by this Court in the exercise of its "power of supervision over the administration of justice in the Federal courts" (*Thiel v. Southern Pacific Co.,* 328 U. S. at 225). It is necessary in order

"to correct an error which permeated this proceeding"[33] (*Ballard v. United States,* 329 U. S. at 193). The existence of such error does not depend upon prejudice to petitioners (*Thiel* and *Ballard* cases, *supra*).[34]

The damage to petitioners arises, without more, out of their indictment by a grand jury and conviction by a jury which was selected in such a manner that it represented a section of rather than the entire community. It is of the same nature as the denial of a jury trial altogether. Because the right which is involved is so fundamental this Court has said:

> "*Tendencies, no matter how slight,* toward the selection of jurors by any method *other than a process which will insure* a trial by a *representative group* are undermining processes weakening the institution of jury trial, and *should be sturdily resisted.*"—*Glasser v. United States,* 315 U. S. at 86. (Emphasis added.)

What is at stake here is not alone the rights of these petitioners, but, what is even more important, the toleration of "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (*Ballard v. United States,* 329 U. S. at 195). If the decision below stands, the discriminatory practices will be allowed to continue unabated and an opportunity to eliminate practices damaging to the administration of justice will be lost.

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[33]The court below treated the question as a jurisdictional one, envisaging that a ruling favorable to petitioners would lead to the vacating of all judgments resulting from jury verdicts during the past years [R. 2629-30].

[34]The alleged lack of prejudice was one basis for the decision below [R. 2638].

Conclusion.

Upon all of the grounds herein stated, the petition herein should be granted, and after hearing, the decision below should be reversed.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Argument	12
Conclusion	26

CITATIONS

Cases:

Allen Bradley Co. v. *Local Union No. 3*, 325 U. S. 797	20
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	12, 13, 16, 19
Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U. S. 427	13
Ballard v. *United States*, 329 U. S. 187	21
Columbia River Packers Association v. *Hinton*, 315 U. S. 143	15, 16
Fay v. *New York*, 332 U. S. 261	21, 24
Glasser v. *United States*, 315 U. S. 60	21
Hinton v. *Columbia River Packers Ass'n*, 131 F. 2d 88	20
International Salt Co. v. *United States*, 332 U. S. 392	20
Loewe v. *Lawlor*, 208 U. S. 274	12
Smith v. *Texas*, 311 U. S. 128	21
Thiel v. *Southern Pacific Co.*, 328 U. S. 217	21, 23, 24
Thiel v. *Southern Pacific Co.*, 67 F. Supp. 934, affirmed, 169 F. 2d 30, certiorari denied, 335 U. S. 872	24
United States v. *Borden Co.*, 308 U. S. 188	20
United States v. *Foster*, 83 F. Supp. 197	25
United States v. *Hutcheson*, 312 U. S. 219	17
United States v. *Joint Traffic Association*, 171 U. S. 505	13
United States v. *Line Material Co.*, 333 U. S. 287	13
United States v. *Paramount Pictures, Inc.*, 334 U. S. 131	13
United States v. *Socony-Vacuum Oil Company*, 310 U. S. 150	13
United States v. *South-Eastern Underwriters Association*, 322 U. S. 533	13
United States v. *Trans-Missouri Freight Association*, 166 U. S. 290	13
United States v. *Trenton Potteries*, 273 U. S. 392	13, 14
United States v. *Women's Sportswear Assn.*, 336 U. S. 460	16

Constitution and Statutes:

	Page
United States Constitution, Amendment XIV	21
Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291	15
Clayton Act, 38 Stat. 731, 15 U.S.C. 17:	
Sec. 6	3, 15, 16
Fishermen's Marketing Act, 48 Stat. 1213, 15 U.S.C. 521:	
Sec. 1	4, 15, 18
Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.*	15
Sec. 1	3
Sherman Act, 26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U.S.C. 1:	
Sec. 1	3

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 562

LOCAL 36, INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES MCLAUCHLAN, ROBERT M. PHELPS, BURT D. LACKYARD, AND RAY J. MORKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 2589) is reported at 177 F. 2d 320. The opinion of the District Court for the Southern District of California on the motions to dismiss the

indictment and strike the jury panel (R. 25, 2523) is reported at 70 F. Supp. 782.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1949 (R. 2641) and a timely petition for rehearing was denied on November 29, 1949 (R. 2643). On December 22, 1949, the time within which to file a petition for writ of certiorari was extended by the Chief Justice to and including January 27, 1950 (R. 2653). The petition was filed on January 27, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

1. Whether it is a violation of Section 1 of the Sherman Act for fishermen operating in commerce to agree to fix the prices at which they will sell their fish and to prevent their customers from receiving fish unless they agree to the prices fixed.

2. Whether the above conduct is exempted from the Sherman Act by the Clayton Act, the Norris-La Guardia Act, the Capper-Volstead Act or the Fishermen's Marketing Act.

3. Whether the methods of selecting the jury panels used in this case systematically and intentionally excluded any eligible group or segment of the community.

STATUTES INVOLVED

Section 1 of Act of July 2, 1890, 26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U.S.C. 1, commonly known as the Sherman Act provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, provides:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 1 of the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 101, provides as follows:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out

> of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 1 of the Fishermen's Marketing Act (Act of June 25, 1934), 48 Stat. 1213, 15 U.S.C. 521, provides in part:

> That persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

STATEMENT

Petitioners are Local 36 of the International Fishermen and Allied Workers of America, and 14 officers and members of the Local. They were convicted by a jury of violating Section 1 of the Sherman Act and sentenced to pay fines ranging from $10 to $3,000 (R. 100). The judgments of conviction were unanimously affirmed by the court of appeals (R. 2641).

I

The indictment charged that beginning some time prior to May 1946 and continuing up until the in-

dictment was returned on August 23, 1946, petitioners engaged in a combination and conspiracy to fix prices for the sale to dealers of fresh fish caught in the ocean off of the coasts of Southern California and Western Mexico and to prevent dealers who did not agree to the prices fixed from obtaining, selling, or shipping any fresh fish or crustaceans (R. 2, 3, 8, 13). The sufficiency of the evidence to support the verdicts is not challenged by petitioners, and that evidence may, for present purposes, be briefly summarized as follows:

Some 20 million pounds of fresh fish are caught annually in the fishing area involved and sold to fresh fish dealers in the area. Over a million pounds of fresh fish are shipped to the dealers from Oregon and Washington each year. (Gov. Exs. 34, 35, R. 842.) The fishermen members of petitioner Local 36 generally fish in boats owned by themselves or other fishermen. Over half the fishermen have listed themselves boat owners or as self-employed in applying for membership in the Association. The fishermen are not compensated by the fish dealers during the period they are out fishing, nor are they subject to any control by the dealers with respect to when and where they fish. The fish caught are sold to the dealers on the basis of individual bargains made when the catch is brought in. In most cases the fishermen have no arrangements with any dealer to buy their catch at the time they go out to fish. When a boat has more than one fish-

erman, the proceeds of the sale of a catch are divided in shares, the fisherman who owns the boat and gear being allocated an extra share to pay for wear and tear on the equipment. (R. 137-8, 279, 370-1, 440, 453, 472, 485, 513, 1370, 1474, 1769.)

In April 1946 it was agreed at a meeting of the Association that a contract (Indictment, Ex. A, R. 14) establishing the minimum prices to be charged the fish dealers for fresh fish and crustaceans should be entered into between the various locals of the Association in Southern California and the fresh fish dealers (Gov. Ex. 201, R. 1115).[1] The proposed contract involved no change in the practice of individual sales of fish by fishermen to dealers, but it set uniform prices for such sales.[2] The contract was submitted to the San Pedro dealers in May 1946, and they were told that unless they signed the contract they would be prevented from receiving fish from

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[1] The plan of action of the Association is set forth in a letter written by petitioner Zafran on May 17, 1946 (Gov. Ex. 203, R. 1115):

> As you may know we are preparing to present a Southern California minimum price contract ranging from Santa Barbara to San Diego.
>
> On Monday, May 20, 1946 a contract will be presented to each dealer in this area. The committees will personally present the contract in San Pedro, Newport and Santa Monica simultaneously. They will be given forty-eight (48) hours to sign. If the contracts are not signed by 7:00 A.M. Wednesday we will establish picket lines and stop all fishing for fresh fish in Southern California. We have then given the dealers to June 1, 1946 to sign, or after that time we will endeavor to stop the flow of all northern fish into this area as well.

[2] The initial price minimums were generally to be the OPA ceiling prices then in force (Par. 4(C), R. 16-17).

any source (R. 166, 437). Finally, on May 27, the dealers were informed that if a minimum price agreement was not signed by May 28, "that no fish of any kind will be brought into San Pedro, starting 7:00 a.m." on May 29 (Gov. Ex. 236, R. 1124). None of the San Pedro dealers signed the contract, and from June 1 until the early part of July the members of Local 36 ceased delivering fish to the San Pedro dealers (R. 317).

In addition to their refusal to deliver fish themselves, Local 36 and its members engaged in various activities directed toward cutting off the supply of fresh fish received by the non-signing fish dealers from any other sources. These included: (1) picketing the fresh fish dealers (R. 161-4); (2) requiring non-member fishermen to obtain clearance cards from Local 36 before going fishing (R. 468-9);[3] (3) seeking to prevent ice deliveries to fishing boats not possessing clearance cards (Gov. Ex. 214, R. 1120); (4) seeking to make it impractical for the dealers to receive fish at their markets by preventing ice deliveries at the markets (R. 558); (5) seeking to prevent the Railway Express Agency from delivering fish to the dealers by threats to picket the Railway Express Agency's San Pedro office (R. 574); and (6) threatening the driver of a

[3] These cards were issued only to fishermen who would participate in the picketing of the dealers or pay for the hiring of substitutes (R. 468-9, 478, Gov. Ex. 227, R. 1122). And such fishermen were instructed not to sell their fish to non-signing dealers (R. 446, 504).

Los Angeles-Seattle Motor Express Company truck attempting to deliver fish to a picketed dealer that if he tried to transfer the fish to one of the dealer's trucks out on the highway, the pickets would "destroy the fish, or knock it off the truck or something" (R. 878-9).

II

Petitioners challenged the impartiality of the selection of the jury panels from which the grand jury that indicted them, and the petit jury that tried them, were drawn. Both courts below have rejected these challenges (R. 2573, 2640) but petitioners persist in them here (Pet. 77). Accordingly, it is necessary briefly to describe the methods by which the jury lists were made up.

The two basic sources of names for jury service were (1) a file in the clerk's office listing about twenty-five or thirty thousand persons referred to as "available" because they had served on juries at times more than two years past, or had been found presumptively qualified for jury service (R. 1996-97, 2072, 2096), and (2) lists of names furnished by the jury commissioner from time to time (R. 1986-7). Questionnaires were sent to the persons on the commissioner's lists and to persons selected at random from the clerk's file (R. 2036-38, 2552). From the list of persons who answered questionnaires,[4] the clerk eliminated the names of those

[4] More than two-thirds of the questionnaires were not answered (R. 2114).

whose answers showed obvious statutory disqualification by reason of age, non-citizenship, change or duration of residence, or illiteracy (R. 2082-85, 2552). The remaining names were placed in a box from which the commissioner and the clerk drew names (R. 1969-70). The persons whose names were drawn were summoned for jury service (R. 1971). Of these, an undetermined number were eliminated by the court for disqualification or exemption under the California law or the federal statutes, or merely excused (R. 1972, 1993). Juries were selected from the persons remaining.

As to the great bulk of the names furnishing the sources of jury lists no specific evidence was adduced. It appears that the greater portion of the names was originally furnished by the jury commissioner over a period of years from diverse sources (R. 2071).[5] A smaller number of names were obtained by the clerk, also from various sources (*ibid.*).[6] Complete information as to the sources of names furnished by the jury commissioner was available only as to 6712 names fur-

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[5] The sources included the following: the Los Angeles telephone book (R. 2171), a comparatively small number from the Southwest Blue Book, a social register (R. 2129, 2158), various clubs (R. 2124, 2126), a list of bank employees (R. 2494), Railroad brotherhoods (R. 2130), the Congress of Parents and Teachers (R. 2144), a list from a Negro minister (R. 2150-1), and personal property assessment lists (R. 2150).

[6] These included a list of names of Negroes collected by a deputy clerk from undetermined sources (R. 2067-8), and another of Chinese-Americans compiled from naturalization records (R. 2070).

nished from 1943 to the time of the trial in 1947. As to these, 1680, or about 25%, came from a publication called the *Southwest Blue Book,* which purports to be a social register; 154 names, or 2%, came from two women's clubs and the Congress of Parents and Teachers; and the remaining 4878, or 73%, were taken from the telephone directory, except for an undetermined number taken from a list of automobile owners (R. 2122-49, 2549).

At no time has there been elimination by the clerk or jury commissioner of any prospective juror because he was a day laborer, a member of a labor union, or a Negro (R. 2088-9). Both the commissioner and the clerk testified that there was no intentional discrimination by them against any group, occupation or race in the selection of the names for the jury lists (R. 2172, 2094-5).

The petitioners called as a witness a statistician retained to make an occupational survey of the jury panels selected in 1946 and 1947 up to the time of the trial (R. 2226). He testified that the occupational distribution of the panels was different from that of the entire population, and that statistical theory indicates that the mathematical probability of the selection of such a panel from the entire population by a purely random method is remote (R. 2300-23). Petitioners, however, did not attempt to show how much of the alleged non-representative character of the panels was due to the

nature of the lists from which the panels were drawn and how much due to the intermediate steps in the process of jury selection.[7]

The petitioners' expert also testified that the sources used by the jury commissioner in obtaining names were not representative of the entire community (R. 2366-86), and discussed the relative merit of various available sources of names (R. 2223-5). Stating that no source of names was complete (and therefore completely unbiased in the statistical sense), he said that the list of registered voters in the county was the best source of names available (R. 2223), and that the listings in a telephone directory are biased (R. 2340). The voters registered totalled 1,277,418, after deducting 583,627 who had failed to vote, and the population of the county was estimated to be 3,747,962 (R. 2253). The witness estimated, based on the 1940 Census, that 27.6% of the population is under 21 years of age (R. 2337-9). Applying this estimate to the recent population estimate, the approximate number of persons in the county over 21 years of age was in excess of 2,700,000. Thus, the approximate part of the presumptively eligible population appearing in the most recent registry of voters was

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[7] The petitioners' witness did testify that certain groups of persons are more likely to answer questionnaires than others. This asserted tendency, however, was said to follow a special classification of occupations rather than economic levels (R. 2391-2401).

48%; using a previous registry of voters, 66% of the population appeared (R. 2459-60). Although petitioners' witness was unable to say whether this register would present a fair cross-section of the community, stating that the matter would have to be determined empirically, he nevertheless maintained that it was, for statistical purposes, superior to other available sources (R. 2460).

The trial court found as a fact that the system of jury selection used did not result in exclusion of prospective jurors on the basis of economic status, occupation, race, religion or sex (R. 2573).

ARGUMENT

1. Although the argument is not spelled out with precision, petitioners apparently contend that the original Sherman Act was not intended to and does not apply to fishermen who combine to fix the prices for their catch, because they are "working original producers" (Pet. 42-5). Thus petitioners would renew the traditional attack upon *Loewe* v. *Lawlor,* 208 U. S. 274, which definitively rejected the argument that the Sherman Act exempts labor or any other group when the activities of that group operate to restrain interstate commerce. In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487, the Court took occasion again to reject the challenge to *Loewe* v. *Lawlor,* pointing out that during the thirty-two years the decision had stood Congress had not seen

fit to change the law to extend a blanket exemption to labor.[8]

Apart from the effect of subsequent statutes (discussed *infra*) which assertedly exempt petitioners from the Sherman Act, there can be no question but that the activities charged in the indictment violated the basic Act. Petitioners were charged with conspiring to "fix, determine, establish, and maintain arbitrary, artificial and non-competitive prices for the sale to dealers of fresh fish * * * and to prevent dealers who do not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans" (Indictment, R. 8). It is settled law that a combination to fix the price of goods in interstate commerce constitutes an unreasonable restraint of trade *per se*.[9] And the particular acts proved (*supra*, pp. 6-8) show beyond doubt that the petitioners combined to coerce the fish dealers to agree to the prices fixed by prevent-

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[8] It is true that in the *Apex* case the indirect impact of labor's collective bargaining process on interstate commerce was held to be without the scope of the Sherman Act. Here, however, the "collective bargaining" concerns not the wages of labor but the price of fish. And as *Apex* makes clear, agreements which impair competition among sellers of goods constitute one of the principal evils at which the Sherman Act was aimed. See 310 U. S. at 497-8.

[9] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *United States* v. *Trenton Potteries*, 273 U. S. 392; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 535-536; *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143.

ing them from receiving fish unless they would sign the contracts presented to them by petitioners.

Petitioners have contended (Pet. 64-9) that the peculiar economic conditions existing in the fishing industry justify an exception being made in the application of the *per se* rule here. They argue that the rule should not apply to the efforts of fishermen to fix the prices paid for fish caught by them, and assign as error the exclusion of evidence as to the economic conditions of fishermen (Pet. 64). These arguments are in effect aimed at the *per se* rule itself. That rule rests on the premise that *any* fixing of prices is unreasonable without regard to the particular circumstances relied upon to justify it. As this Court pointed out in *United States* v. *Trenton Potteries*, 273 U. S. 392, 397-8:

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

The trial court properly excluded the proffered evidence of the conditions in the industry and properly instructed the jury that the reasonableness or unreasonableness of the prices fixed by the agreement was immaterial (R. 1940).

2. Petitioners next argue (Pet. 41-63) that, whatever the correct interpretation of the original Sherman Act, their activities here are exempted from it by one or more of the following statutes: Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 105, the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291 or the Fishermen's Marketing Act, 48 Stat. 1213, 15 U.S.C. 521. None of these statutes, however, justifies petitioners' reliance upon it.

a. *The Clayton and Norris-La Guardia Acts*

No serious contention can be made that petitioners' activities fall within the ambit of the Norris-La Guardia Act (*supra*, pp. 3-4) since this Court held squarely to the contrary in a case on all fours with the instant case. In *Columbia River Packers Association* v. *Hinton*, 315 U. S. 143, it was held that fishermen who furnish their own boats, fish where and when they please, and sell their catch to whomever they please are not in an employer-employee relationship with their fish dealer customers.[10] Ac-

[10] The Court said (315 U. S. at 145): "That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms

cordingly, it held the Norris-La Guardia Act inapplicable to prohibit an injunction restraining such fishermen from violating the Sherman Act. It is plain that the fishermen in the instant case occupy the same relationship to the fish dealers here (*supra*, pp. 5-6).[11]

It is equally clear that Section 6 of the Clayton Act (*supra*, p. 3) is of itself of no aid to petitioners. Even if it be assumed for the purpose of discussion that the Association could for some purposes be regarded as a "labor organization" within the meaning of Section 6, that would not legalize the activities charged and proved against the petitioners here. Petitioners have combined to fix the price of goods in commerce and to prevent their customers from purchasing elsewhere unless they submit to petitioners' terms.

As is made clear by *Apex Hosiery Co.* v. *Leader*, *supra*, even a bona fide labor union loses the protection of the Clayton Act where the purpose and effect of its activities is to "monopolize the supply,

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or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment' calls for no extended discussion." And see *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 463-4, holding that even where labor is a principal factor in one's cost of production, he may nevertheless be an *entrepreneur*.

[11] Although it would have been justified, on the basis of the *Hinton* case, in excluding from the jury the question whether there was an employment relationship the trial court submitted the question to the jury as one of fact (R. 1939, 1944).

control * * * price or discriminate between its would-be purchasers" (310 U. S. at 512).

Since petitioners can rest on neither Act alone, they advance the curious contention that, although the Norris-La Guardia Act would not be applicable here under any circumstances because of the lack of an employment relationship between the petitioners and the fish dealers, it nevertheless in some obscure way has the effect of broadening the Clayton Act to embrace within its protection this association of independent businessmen who sell fish. This novel argument finds no support in *United States* v. *Hutcheson,* 312 U. S. 219, which holds that acts which the Norris-La Guardia Act puts beyond the reach of injunction are likewise beyond the reach of criminal prosecution under the antitrust laws. The doctrine here urged by petitioners is, in effect, that acts which the Norris-La Guardia Act does not put beyond the reach of injunction are nevertheless put beyond the reach of criminal prosecution.

The trial court fully and correctly instructed the jury as to the application of Section 6 of the Clayton Act (R. 1943-5), and it properly instructed that conviction would be proper if the jury should find that the fishermen were independent businessmen who conspired to fix prices and prevent fish dealers from buying from other sources (R. 1939). The various instructions embodying petitioners' erroneous interpretation of the Clayton Act were correctly refused.

b. *The Capper-Volstead Act and Fishermen's Marketing Act.*

Petitioners also seek to uphold their activities under the Fishermen's Marketing Act read in the light of the Capper-Volstead Act after which it was patterned. Concisely stated, petitioners' position is that the contract proposed by them to the fish dealers (R. 14) was a proper device for the collective marketing of the fish caught by the members of the Association, and that collective marketing is expressly permitted by Section 1 of the Fishermen's Marketing Act (*supra,* p. 4) (Pet. 58-63). The coercive methods which were used by the petitioners to compel fish dealers to sign the contract are contended to be beyond the reach of the Sherman Act because their objective is legal (Pet. 70-76).

The correctness of the first of these contentions may be conceded, *arguendo.*[12] Indeed, the trial court's instructions to the jury are entirely consistent with this contention (R. 1940-2). But the second contention—that, assuming petitioners might lawfully combine for cooperative marketing, their activities directed toward imposing a collective marketing agreement upon their customers do not violate the Sherman Act—is wholly fallacious. The argument rests on an analogy to cases

[12] As the court below pointed out, it is unnecessary to consider the validity under the Sherman Act of the proposed contract standing alone (R. 2595).

involving the collective bargaining activities of labor. Thus *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, held that lawless local activities of labor directed at procuring a lawful agreement involving terms of employment did not violate the Sherman Act even though the indirect effect was a restraint on commerce. The rationale of that case is based upon the common law origins of the restraint of trade principles which underlie the Sherman Act. The Court concluded that restraints resulting from the activities of labor with respect to conditions of employment were not encompassed by the Act.

The subject matter here is quite different. There is a fundamental difference between restraints of trade resulting from the efforts of a labor organization to gain advantageous conditions of employment, and restraints imposed by an organization of sellers in an effort to control the prices and conditions upon which they will agree to sell. The former do not involve restraints of the kind which the Sherman Act is designed to prohibit. *Apex Hosiery Co.* v. *Leader, supra.* The latter show a purpose and plan to restrain the relationship between buyer and seller. The fact that the members of the organization plan to enter perfectly legal contracts of sale, for which they might negotiate collectively, does not justify a scheme designed to prevent prospective customers from dealing with competitors, indeed, to prevent customers from being able to buy anywhere unless they surrender

to the terms being forced upon them. Cf. *International Salt Co.* v. *United States,* 332 U. S. 392.

The trial court's instructions based on the Fishermen's Marketing Act correctly reflect the law applicable to the facts presented by this record. The court read to the jury the applicable portions of the Act (R. 1940-41) and then drew a distinction between contracts arrived at through voluntary collective marketing which are permissible, and contracts arrived at by coercion which are unlawful (R. 1942). Like the limited exemptions accorded to labor and farmers (cf. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797; *United States* v. *Borden Co.,* 308 U. S. 188) the Fishermen's Marketing Act is not a general license to restrain trade. *Cf. Hinton* v. *Columbia River Packers Ass'n,* 131 F. 2d 88 (C. A. 9).

As there is no conflict of decisions, and the instructions to the jury correctly stated the law, there is no occasion for review by this Court.

3. In attacking the method of selecting grand and petit jurors here used, petitioners advance two arguments. First, they contend that the sources of names used had an inherent tendency to underrepresent certain economic groups within the community. Second, they contend that the composition of the resulting jury panels demonstrates that the sources used did not include a proper cross-section of the community. We think that the courts below properly held that petitioners failed to sus-

tain the burden of showing the kind of intentional and systematic exclusion of particular groups or classes which has been condemned by the cases.

The cases relied upon by petitioners hold that a jury panel is defective if there is a systematic and intentional exclusion of a particular economic class, racial group, or other defined segment of the population. This is not such a case. There was here no deliberate and systematic exclusion of a certain group in the community, like that in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 and *Ballard* v. *United States*, 329 U. S. 187. Neither is this a case in which persons selected from a particular classification of those eligible were taken from a sub-classification of that group, like *Glasser* v. *United States*, 315 U. S. 60, 83. It is not a case where the results of the selection and the procedures used combine to show a system designed to accomplish a virtual exclusion of a clearly defined group within the community, like *Smith* v. *Texas*, 311 U. S. 128 (involving the application of the Fourteenth Amendment; compare *Fay* v. *New York*, 332 U. S. 261).

Evidence was introduced of the compilation of lists of names furnished to the clerk for the past four years, a total of 6712 names (*supra*, pp. 9-10). But the great mass of persons available for jury service were listed in a file of some 25,000 or more names accumulated since about 1925 (*supra*, p. 8). No data as to the exact sources of the names used could be obtained. At most, the evidence indicates

that the file of 25,000 "available" names was made up from sources roughly similar to those used in recent years (R. 2159-2160).

The conduct of the clerk and jury commissioner, far from showing systematic and intentional exclusion of particular groups or parts of the population, shows rather an utter lack of system as to use of particular classes or groups.[13] It is significant that the largest single source of names in recent years, the telephone directory, gives no information whatever as to race or economic status, and only the flimsiest of clues as to religion and national origin.[14] True, petitioners' expert testified that telephone directories do not list a statistically perfect cross-section of the community (R. 2340). It is obvious that telephone directories included only those who are able to pay for telephone service; there can be no claim, however, that such directories do not list, in substantial numbers, relatively poor persons, day laborers, members of labor unions, members of racial minorities, and other groups. The witness merely testified as to the rela-

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[13] In this connection see particularly R. 1996-2000, 2036-38, R. 2137-48.

[14] The *Southwest Blue Book*, the use of which is particularly challenged by petitioners, also gives very little information about those listed therein. Although an attempt was made (R. 2367-86), petitioners failed to establish the economic and social standards for listing in this publication. Of course, we do not contend that this book lists an accurate cross-section of the community. However, from the thousands of persons listed, it is obvious that listing is not confined to the *corps d' elite* of California society (Def. Ex. U, R. 2156).

tive merit of the various available sources of names (R. 2223-5). No source gives a complete representation, nor does any approach perfection; a list of registered voters was the expert's choice as the best available source, but he conceded that 40% of the persons eligible do not register (R. 2225).

In their attack upon the selection of names from which jurors were drawn, the petitioners rely heavily upon an analysis of the composition of the actual panels and of the actual juries.[15] This analysis is relevant only insofar as it reflects the composition of the original lists,[16] since petitioners had no right that the particular jury which tried them be representative of the population. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220. In the argument based on this analysis, petitioners ignore the possible effects of the intermediate steps in the process of jury selection. First, only those persons who answered questionnaires mailed to them were considered for jury duty (R. 2102). Second, the

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[15] The District Judge made his own classification of the occupations listed by members of the panel, and differed considerably with the expert's conclusions. He thought a much greater proportion of the panel came from "lower" occupational categories—probable union members, employees rather than employers, petty tradesmen and clerks, skilled and unskilled labor, etc. (R. 2555-65).

[16] No direct evidence was adduced as to the occupational classification of persons named on the original lists of the jury commissioner and on the great mass of cards in the available file, since this information was not shown except on some of the older cards in the available file. The petitioners' expert testified only as to the inferences of occupational bias to be drawn from the evidence of the sources of names.

clerk of the court eliminated those whose answers to the questionnaire showed obvious disqualification or exemption (R. 2082-87). Third, the court eliminated all others found to be disqualified or exempt by statute, or who, in the judgment of the court, showed sufficient excuse (R. 1972-3).[17]

Each of these steps might distort the jury panel from that perfect cross-section of the population demanded by petitioners. The petitioners neither urge error in this intermediate process nor offer to explain the statistical effects of it, yet they offer the composition of the final panels as conclusive proof of purposeful underrepresentation of certain groups in the original lists.[18] The testimony of

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[17] The possible effects of clearly valid requirements for eligibility (literacy in English, citizenship, age and property) are commented upon in *Fay* v. *New York, supra*, p. 276, 277. The disposition of judges to excuse wage earners who aver that jury service will cause financial hardship is familiar to this Court. *Thiel* v. *Southern Pacific Co., supra*, majority opinion, p. 222; dissent, pp. 231-232.

[18] In this regard it is interesting to note that even when an intensive effort is made to secure a cross-section of the community in the original selection of names, the jury panels may still show a pattern of representation like that attacked in this case. When the *Thiel* case was tried anew, the composition of the panels and the method of selection were again attacked. It appears from the opinions that certain groups of the population were not represented on the lists and panels in the same proportion as in the population. *Thiel* v. *Southern Pacific Co.*, 67 F. Supp. 934 (N.D. Calif.), affirmed, 169 F. 2d 30 (C.A. 9), certiorari denied, 335 U. S. 872. Concurring in the court of appeals, Judge Healy said (169 F. 2d at 32):

> It is probably open to debate whether the practice squares in all respects with the the views expressed by the [Supreme] Court in the opinion reversing the earlier judgment. * * * Obviously any method devised in an effort to obtain a fairly representative group of jurors will

petitioners' expert that the composition of the final panels was such that they could not possibly have been drawn from a representative list rests upon the unspoken and unsound premise that the intermediate and unchallenged steps in the process of selection did not change the relative composition of the group.

Even if petitioners' statistical analysis be accepted,[19] there is no showing that the method used, though admittedly less than perfect, amounts to any systematic exclusion of particular groups or classes. However unscientific the commissioner's method of obtaining names, the record is barren of evidence that his actions were actuated by a desire to exclude or underrepresent any particular segment of the population.[20] And the trial judge

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be open to criticism, for it is not possible even to approximate perfection along this line. Persons qualified and available for jury service do not readily yield to classification in a society so fluid as ours. They cannot be neatly pigeonholed like specimens of rock or mineral.

[19] As the district court demonstrated, there is grave doubt as to the usefulness of an analysis of occupations based upon the census (R. 2543-5). The same conclusion was reached in *United States* v. *Foster*, 83 F. Supp. 197, 202 (S.D. N.Y.).

[20] It must be noted that this jury commissioner's compensation was $15.00 per year, and that he was furnished no clerical assistance whatever. (R. 2142, 2171.) By comparison, the system used by the local state courts required one-half of the time of an officer of the court, the full-time services of one secretary, and half-time services of ten other persons (R. 2198-9). The cost of obtaining 4,000 names for prospective jury service was estimated to be $9,172.50 (R. 2196). It was testified that a list of registered voters, which was recommended by petitioners as a source of jury lists, was furnished to the state courts free and would probably cost the Federal jury commissioner $930.58 (R. 2484-86).

explicitly found that no such motives existed (R. 2573).

Obviously there are almost infinite possibilities of variation between a method of jury selection which excludes all members of a substantial group of the persons eligible for jury service and a method which obtains a precisely proportional cross-sectional representation from the entire community. To permit the one would seriously injure our jury system; to demand the other would set an impossibly absolute standard. It cannot be contended that the method of selection here used is an example of either extreme. The decision of the two courts below, that the system employed here falls on the permissible side of the critical line between the two extremes, is correct and should not be further reviewed.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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